TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 485.

HENRY B. MERRILL, DAVID G. FLOYD, CHARLES BATES, AND HENRY S. ACKLEY, AS EXECUTOR OF ELISHA S. CHAMPION, DECEASED, APPELLANTS,

vs.

JOHN W. PETTY AND ISAAC HOMAN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED NOVEMBER 26, 1872.

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1 UNITED STATES OF AMERICA,
Eastern District of New York, ss:

I, Samuel T. Jones, clerk of the district court of the United States of America for the eastern district of New York, do hereby certify that the writings annexed to this certificate are true copies of their respective originals, on file and remaining of record in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Brooklyn, in the eastern district of New York, this 9th day of May, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the said United States the ninety-fifth.

[L. S.] SAMUEL T. JONES, *Clerk.*

2 At a stated term of the district court of the United States of America for the eastern district of New York, held at the United States court-rooms, in the city of Brooklyn, on the 15th day of January, in the year of our Lord one thousand eight hundred and sixty-nine—

Present, the Honorable Charles L. Benedict, district-judge.

JOHN W. PETTY ET AL.
vs.
HENRY B. MERRILL ET AL.

The libellants appear, by F. A. Wilcox, their proctor, and file their libel against the above-named respondents in the words and figures following, to wit:

3 To the Honorable Charles L. Benedict, judge of the district court of the United States for the eastern district of New York:

The libel and complaint of John W. Petty and Isaac Homan, owners of the schooner Mary Eveline, her tackle, &c., ag'st Henry B. Merritt, David G. Floyd, and Charles Bates, and Henry S. Ackley, as executor of the last will and testament of Elisha S. Champion, deceased, in a cause of collision, civil and maritime; and thereupon the libellants allege and articulately propound as follows:

First. That the said respondents are now in this district or have goods and chattels therein; and that, on or about the twentieth day of September, in the year of our Lord one thousand eight hundred sixty-eight, and during the times hereinafter mentioned, the libellants were the true and only owners of the said schooner Mary Eveline, together with tackle, apparel, and furniture, and the respondents owners of the sloop Ethan Allen, her tackle, &c., and the said respondent, Henry S. Ackly, executor of the last will and testament of Elisha S. Champion, deceased.

4 Second. That, on the said day, the said schooner was beating down the East River, the wind being about southwest, tide ebb, at about 2 o'clock in the afternoon, having just left Riker's Island, bound for New York, and had taken the channel to the east of Blackwell's Island, having another schooner, the Hawley, just ahead of her; that the said schooners had beaten out their tacks to the eastward and ran as near the west shore of Long Island as they could go; that the Hawley, being ahead, went about on her westward tack and towards Blackwell's Island first, and was just in the act of going about again on her eastward tack as the Mary Eveline had gone about; that, to avoid the Hawley, it became necessary for the Mary Eveline to go to the leeward

and stern of the Hawley in making her westward tack, and had just cleared the stern of the Hawley when the said sloop Ethan Allen was seen sailing up the said channel to the eastward of Blackwell's Island, at or near the center thereof, going before the wind with her boom on her port side, with her mainsail and jib set, and going at full speed at about six or seven knots an hour, and at about one hundred yards
5 on the port bow of the Mary Eveline, which was at this time going about and following the Hawley, and nearly head to the wind, with the head-sheets flowing and helm hard-a-lee, when the said sloop Ethan Allen, instead of keeping out of the way, as she clearly should have done, by luffing an' keeping off, and with mainsail set and jib set, and under full headway, ran into and against the said schooner Mary Eveline, striking her cat-head against the stern of the Mary Eveline, knocking her fore-foot off, and splitting the stern of the Mary Eveline, and doing other serious damage to the Mary Eveline.

Third. That owing to the sudden and confused orders on board the "Ethan Allen," keeping off and then immediately luffing, it became impossible to avoid said collision, and that the same occurred wholly through the fault and negligence of said sloop "Ethan Allen," and of those navigating her, and was in no way the fault of the "Mary Eveline" or of those having charge of or controlling her.

Fourth. That it has cost, and will necessarily cost, to repair the damages thus sustained by the "Mary Eveline," the sum of fifteen hundred dollars, and that the necessary detention while undergoing such
6 repairs will be period of twenty-nine days, and that a fair and reasonable demurrage of said vessel will be the sum of twenty dollars per day, making the sum of five hundred & eighty dollars, and that the expense of towing to and from dry-dock will be the sum of twenty dollars, amounting in the aggregate the sum of twenty-one hundred dollars.

Fifth. That payment for said damages has been demanded and refused.

Sixth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court, and of the United States.

Wherefore the libellants prays that the usual process in such cases may issue against said respondents, with a clause therein directing in case said respondents cannot be found, that then their goods and chattels may be attached to the amount of said damage and costs, and that the said respondents may be required to answer all and singular the matters so as aforesaid propounded, and that this honorable court would be pleased to decree the payment of the amount due to your libellants, as aforesaid, with costs; and that they may have such further and
7 other relief in the premises as shall to law and justice appertain.

J. W. PETTY.

Sworn to before me this 14th day of January, 1869.

A. W. HALL,
Notary Public, N. Y. Co.

F. A. WILCOX,
Libellants' Proctor.

(Endorsed:) U. S. district court eastern district. John W. Petty et al. vs. Henry B. Merrill et al. Libel. F. A. Wilcox, libl'ts' proctor.

Let process issue, with clause of foreign attachment, as prayed for in the within libel, to the amount of $2,100 therein claimed.

Dated Jan'y 15, 1869.

CHA'S L. BENEDICT.

Filed January 15th, 1869.

[H. Anstice & Co., stationers, 23 Nassau st., N. Y.]

Stipulation for libellants' costs, entered into pursuant to the rules and practice of this court.—Filed the 15th day of January, 1869.

District court of the United States for the eastern district of New York.

Whereas a libel was filed in this court, on the 15th day of January, in the year of our Lord one thousand eight hundred and sixty-nine, by John W. Petty et al. against Henry B. Merrill et al., for the reasons and causes in the said libel mentioned, and praying that said respondents may be cited to appear and that process, with clause of foreign attachment, &c., and the said libellants and F. A. Wilcox, surety, the parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the libellants or their surety, execution may issue against their goods, chattels, and lands, for the sum of one hundred dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is, bound in the sum of one hundred dollars, conditioned that the libellant above named, shall appear and answer to the cause, and to interrogatories, and shall pay all such costs as shall be awarded against them by this court, or, in case of appeal, by the appellate court.

JOHN W. PETTY.

By his att'y, F. A. WILCOX.

F. A. WILCOX.

Taken and acknowledged, this 15th day of January, 1869, before me,

SAMUEL T. JONES,

U. S. Commissioner.

EASTERN DISTRICT OF NEW YORK, *ss:*

F. A. Wilcox, one of the parties to the above stipulation, being duly sworn, doth depose and say that he resides in the city of New York, and that he is worth the sum of two hundred dollars, over and above all his just debts and liabilities.

F. A. WILCOX.

Sworn to this 15th day of January, 1869, before me,

SAMUEL T. JONES,

U. S. Commissioner.

Recorded the 15th day of Jan'y, 1869.

SAMUEL T. JONES, *Clerk.*

9 [H. Anstice & Co., stationers, 23 Nassau street, N. Y.]

[L. S.] The President of the United States of America to the marshal of the eastern district of New York, greeting:

Whereas a libel has been filed in the district court of the United States of America for the eastern district of New York on the 15th day

of January, in the year of our Lord one thousand eight hundred and sixty-nine, by John W. Petty and Isaac Homan against Henry B. Merrill, David G. Floyd, Charles Bates, and Henry S. Ackley, in a certain action, civil maritime, for damage therein alleged to be due from the said respondents to the said libellant', amounting to twenty-one hundred dollars, and praying that a citation may issue against the said respondent' with clause of foreign attachment, pursuant to the rules and practice of this court: Now, therefore, we do hereby empower and strictly charge and command you, the said marshal, that you cite and admonish the said respondents, if they shall be found within the jurisdiction of said district court, that they be and appear before the said district court on the 20th day of January, 1869, at 12 o'clock, m., the United States court-rooms, in the city of Brooklyn, then and there to answer the said libel, and to make their allegations in that behalf; and if the said respondent' cannot be found, that you attach their goods and chattels to the amount sued for, and have you then and there this writ, with your return thereon.

Witness the Honorable Charles L. Benedict, judge of said court, this 15th day of January, in the year of our Lord one thousand eight hundred and sixty-nine, and of our Independence the ninety-third.

SAMUEL T. JONES, *Clerk.*

F. A. WILCOX,
Proctor for Lib'lts.

10 (Indorsed:) 402. Vol. , No. . United Statss district court. John W. Petty and Isaac Homan vs. Henry B. Merrill, David G. Floyd, Cha's Bates, and Henry S. Ackley. Process in personam, with clause of foreign attachment. Per curiam. Returnable Jan'y 20th, 1869. F. A. Wilcox, proctor for lib. Filed January 20th, 1869.

I hereby depute Peter W. Guinand to execute the within process. Dated Jan'y 16th, 1869.

FRANCIS L. DALLON,
U. S. Marshal.

Rec'd Jan'y 15th, 1869, @ 12.15 p. m.

11 [Respondent's costs. H. Anstice & Co., stationers, 23 Nassau st., N. Y.]

Stipulation entered into pursuant to the rules and practice of this court.—Filed the 23d day of January, 1869.

District court of the United States for the eastern district of New York.

Whereas a libel was filed in this court on the 15th day of January, in the year of our Lord one thousand eight hundred and sixty-nine, by John W. Petty & others against Henry B. Merrill & others, for the reasons and causes in the said libel mentioned, and praying that process may issue, &c., and the parties hereto hereby consenting that in case of default or contumacy on the part of the respondents, or their surety, execution for the sum of two hundred and fifty dollars may issue against their goods, chattels, and lands;

And whereas an appearance has been entered by said respondents:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is hereby, bound in the sum of two hundred and fifty dollars, conditioned that the respondents above named shall pay all costs

and expenses which shall be awarded against them by the final decree of this court, or, upon an appeal, by the appellate court.

CHARLES BATES,
H. S. RACKETT,
H. B. MERRILL,
D. G. FLOYD, &
H. S. ACKLEY, *Ag't*,
Per STANLEY HUNTLEY.

Taken and acknowledged this 23d day of January, 1869, before me,

U. S. Commissioner.

EASTERN DISTRICT OF NEW YORK, *ss:*

Henry Rackett, one of the parties to the above stipulation, being duly sworn, doth depose and say that he resides in the city of Brooklyn, 142 3d st., E. D.; that he is worth the sum of five hundred dollars, over and above all his just debts and liabilities.

H. S. RACKETT.

Sworn to this 23d day of January, 1869, before me,

U. S. Commissioner.

Recorded the 23d day of January, 1869.

SAMUEL T. JONES, *Clerk.*

12 To the Honorable Charles L. Benedict, judge of the district court of the United States for the eastern district of New York:

The answer of Henry B. Merrill, David G. Floyd, and Charles Bates, for themselves, and of Henry S. Ackley, as executor of the last will and testiment of Elisha S. Champion, deceased, the respondent' to the libel and complaint of John W. Petty and Isaac Homan, libellants.

And now come the said respondents, and for answer to the libel of the libellants against them, do allege and propound as follows:

First. That the facts and circumstances of the collision in the libel mentioned in the second article thereof are in said libel in great part falsely and untruly alleged and pleaded, and that the cause and true history of said collision are as hereinafter set forth.

Second. That said collision did not occur through or by any fault, negligence, or mismanagement of the sloop Ethan Allen, and of those navigating her, or through or by the sudden and confused orders on board the said Ethan Allen, as charged and set forth in the third article of the libel and complaint herein, but solely through and by reason of the fault, negligence, and mismanagement of those having charge and management of the said "Mary Eveline."

13 Third. That these respondents have no knowledge or information as to the exact amount of the damage done to the said "Mary Eveline" by said collision, as is alleged in the fourth article of said libel; but they allege that said damage, loss, and detention are greatly exaggerated and overestimated and overstated in said article, and they leave the libellants to such proof in that behalf as they may be advised.

Fourth. That the true facts and circumstances of the collision in the libel mentioned are as follows, to wit:

That at about 7½ o'clock on the morning of Sunday, September 20th, 1868, the sloop "Ethan Allen," whereof these respondents are the owners, of forty-one tons burthen, and having a crew of two men, besides the master, who was the respondent Henry B. Merrill, sailed from Wood's dock, on the Raritan River, in the State of New Jersey, bound for Middletown, in the State of Connecticut, with a cargo of clay and sand on board; that at about 2 o'clock in the afternoon of said last-named day said sloop had arrived at the lower or southern extremity of Blackwell's Island, and was passing through the East River, on the east side of Blackwell's Island, against a strong ebb-tide, with the wind about south-southwest
14 and blowing a whole-sail breeze; that for the purpose of taking advantage of an eddy-tide, said sloop was standing along at the distance of from fifty to seventy-five feet from the Blackwell's Island shore, and at about half past two in the afternoon had run a little more than half the length of that island, and was still standing along very near the shore, with the boom on her port-side, and was still in the eddy made by tide in that locality; that while said sloop was so standing along on a steady course, at about the hour last named, two schooners were beating up the East River towards New York City, on the same side of Blackwell's Island, & at the time last named were standing across the river to the westward; that the foremost and windward of said schooners beat out her tack and went about just abreast of said sloop "Ethan Allen," and at a safe and suitable distance from her; that the others of said schooners, which proved to be the "Mary Eveline," stood along to the leeward of the other schooners, and continued so standing after that other schooner went about, and in such a position and direction as entirely to prevent the "Ethan Allen" luffing, or in any other way avoiding her; that she continued her course till she
15 arrived at a point ahead of and off the starboard-bow of the "Ethan Allen," when she put down her helm to go about, and while in the act of luffing into the wind, she run into and upon the said sloop "Ethan Allen," striking her at the cat-head on her starboard-bow, breaking and crushing in her planking, and causing her to sink in a very few minutes, with a total loss of said sloop and her cargo, and all materials and implements for the management and navigation of said sloop.

Fifth. That these respondents on the twenty-third day of December, 1868, filed a libel against the said schooner "Mary Eveline," her tackle, apparel, and furniture, and against all persons lawfully intervening for their interest herein in the district court of the United States for the southern district of New York, for the same collision set forth in the libel of the libellants herein and more particularly stated in the last proceeding article.

Sixth. That all and singular the premises are true.

Wherefore these respondents pray that said libel and complaint be dismissed, and for their costs.

HENRY S. ACKLEY.

16 Sworn this 26th day of January, 1869, before me—
EDWARD L. OWEN,
U. S. Commissioner for the Southern Dist. of New York.

R. H. HUNTLEY,
Proctor & Advocate.

(Endorsed:) U. S. district court eastern district of N. Y. John W. Petty & ano. ag'st Henry B. Merrill et al. Answer. Rich'd H. Huntley, proctor & advocate, 35 Pine st., N. Y. City. Filed Jan'y 26, 1869.

17 At a stated term of the district court of the United States of America for the eastern district of New York, held at the United States court-rooms, in the city of Brooklyn, on the 21st day of April, in the year of our Lord one thousand eight hundred and sixty-nine—

Present, the Honorable Charles L. Benedict, district judge.

JOHN W. PETTY ET AL.
vs.
HENRY B. MERRILL ET AL.

Cause called; parties ready; trial ordered.
Mr. Wilcox reads libel.
Mr. Huntley " answer.

Evidence for libellant:
James Simmons sworn and examined.
John W. Dudley " " "
Hearing suspended until April 22d, 1869.

APRIL 22D, 1869.—Hearing resumed.

Evidence for libellants continued:
John W. Dudley recalled and examined.
John W. Petty sworn " "
Hearing suspended until April 23d, 1869.

APRIL 23D 1869.—Hearing resumed.
Examination of John W. Petty continued.
Hearing suspended until April 26th, 1869.

APRIL 26TH 1869.—Trial of cause resumed.

Evidence for libellant:
Bartlett Horton sworn and examined.
James Simmons recalled " "
Libellants rest.

Evidence for respondents:
Deposition of Charles Bennett read.
" " John N. Andrews "
18 Henry B. Merrill sworn and examined.
Hearing suspended until April 27th, 1869.

APRIL 27TH, 1869.—Hearing resumed.

Evidence for respondents continued:
Thomas Breman sworn and examined.
William S. Wiggins " " "
John Henderson " " "
Henry B. Merrill " " "
Respondents rest.

Evidence for libellants:
John W. Petty " " "
Testimony closed; cause to be summed up hereafter.

SEPTEMBER 17TH, 1869.—Hearing resumed.
Mr. Beebe sums up cause for the libellants.
Mr. Huntley " " " " " respondents.
Cause submitted; decision reserved.

19 U. S. district court, eastern district of New York.

JOHN W. PETTY ET AL.
vs.
HENRY B. MERRILL ET AL. } April 21st, 1869.

Testimony on trial.

JAMES SIMMONS, being duly sworn and examined, says:

I live in North Carolina. I am 54 years old. I followed the water for 30 years. I have been master. I recollect this collision. I was acting mate of the Mary Eveline at the time. I have been on her some six months. The collision was the 20th of September, 1868. The "Mary Eveline" was bound to New York from Bridgeport. She was light. The wind was from the S. W., I should judge; I didn't see the compass. It was about an eight-knott breeze. We were under a single-reefed mainsail, whole foresail, and standing jib. We had anchored at Riker's Island, waiting for the tide to make so we could come this way from the ebb-tide. The ebb-tide had been running over two hours
20 at the collision. I should suppose that was the strongest time of the tide. It was running strong at the time. The wind blowed pretty much straight up the channel—possibly a little off Long Island side. I don't think there was much difference in our tacks. At times one leg might have been a very little the longest—very little difference. There was a schooner ahead of us—the Hawley. I saw the "Ethan Allen," well down the channel. She might have been half-way through. We were just below the short turn then. I think we made three or maybe four tacks after I saw the "Ethan Allen" before the collision. I was forward on the Eveline. The Eveline and the Hawley were on the same tack at the same time after I saw the Allen. When the Hawley tacked the last time before the collision on the Long Island shore, we were following pretty much in her wake. We must have been within twenty-five feet of the Long Island shore when we filled away on the last tack, before the collision—on the Long Island shore. The Mary Eveline was 160 feet long, about, over all.
21 When I first saw the Ethan Allen, I think she was rather closer to the Blackwell's Island shore. When we had filled away from the Long Island shore the Hawley was a little on our starboard bow and about 100 feet ahead of us, standing over to Blackwell's Island. The Mary Eveline was then within about twenty-five feet of the Long Island shore. I saw the Hawley begin to tack again. When she commenced that we had ranged ahead, but very little. We were still pretty close to the Long Island shore. When I saw the Hawley begin to change her head to come about, I don't think there was more than 100 feet between our bow and her stern. The Hawley was then about 200 feet from *the* Blackwell's Island. She was then a little on our starboard bow. I was on the forecastle of the Mary Eveline, forward. We had not then gathered headway enough to undertake to tack. We *was* then, may be, 30 feet from Long Island shore. As the Hawley came round, our stern pointed about in range of her foresail—about there. If we had kept right on we should have struck her. We kept

22 away a little to clear her under her stern. We didn't go any nearer Blackwell's Island than she did; we tacked right in her wake as near as we could. I don't think our larboard forward shrouds cleared the end of the Hawley's main-boom more than the width of my hand. "Hard-a-lee" was the order given on our vessel. It was promptly obeyed. I raised up the jib-sheet. We had four men on board, all told. Myself and another man were forward; the captain was at the wheel and another man with him. When we commenced coming to, the Allen bore on our port bow, rather inside of us, near to Blackwell's Island. I should think the Allen was then about 100 feet from Blackwell's Island shore. Our stern came in contact with her starboard bow. Our stern was then pointing rather on to Blackwell's Island. She was not then quite head to wind, as near as I recollect. I don't think we could have gone inside of her. I think we were quarter of the
23 length of the island down the channel at the time of the collision. We were going, may be, four and a half or five knotts when she was going her best under full headway. At the blow our sails were lifting. I saw a change in the course of the Allen after we commenced tacking. It was to the eastward, off Blackwell's Island. I think she changed a point or a point and a half to eastward. If the Allen had not been there, it is likely we should have gone within 100 feet, or may be nearer to Blackwell's Island. I think we were 125 feet from the shore when we came in collision. I didn't notice how far off the Hawley then was. We got fastened with the sloop Ethan Allen. We were together for, perhaps, three-quarters of an hour. I think it was longer. We was fast to her rigging when she was sinking. She sunk a little over half way over to Long-Island side. We had drifted down some, I think, when she sank, as the current was strong. I am not attached to the Eveline now. I left her some time ago. I am not in the employ
24 of her owners. I arrived here on Tuesday from Portsmouth, North Carolina, where I belong. The Eveline hailed from Brookhaven. The Hawley was a little larger than the Eveline. If the Allen had kept on her course without luffing, I don't think we should have touched her. I know ten feet would have saved the collision. The stem of the Allen was heading a little off Blackwell's Island at the blow. We struck her starboard bow nearly head on. As we came out by the stern of the Hawley, the Allen kind of yawned out, and we came into her nearly head on a little on her, striking her starboard bow about her cat-head. We had then but very little headway, just ranging ahead a little. I think the Allen was going not over seven knotts, if that. The blow didn't knock me down. It knocked our cut-water off, and split her stern open, so that we had to go on ways. If the Allen had luffed when the Hawley tacked on the Long-Island side, she would have
25 passed us both and not come near us. I saw no other vessel but the Allen, then bound east on that channel.

Cross-examined:

I could see the Allen when she tacked over to the Long-Island shore, before the collision. There was nothing to hinder me seeing her. I don't recollect how far from the shore when we then tacked. I know we tacked as near as we could to the island and around the rocks. I can't say how far the Allen was then from the island. She was near' to the island than to Long Island. I didn't notice her boom particularly. I didn't notice how near her boom was to the island. I saw the Allen pretty much all the time—only when she had shut in behind the other vessels. We were 120 feet, say, from the Hawley when we tacked

at the island, before the collision, and were, I think, a little farther astern of her than when we tacked again at the island at the collision. We were gaining on her a little. We didn't expect to pass her. We couldn't well pass her in that narrow nook. We were in the
26 wake of the Hawley when she tacked at the Long-Island side, and 120 feet behind her. She stood to within about thirty feet of the Long-Island shore. I saw the Allen after we filled away on the tack to Blackwell's Island. She was to westward of the Hawley then. I reckon I saw the Allen all the time on that tack till the Hawley hid her, when she came about. We may have gone a third of the way across, when the Hawley hid the Allen from us. The Allen never opened astern of the Hawley till after the Hawley went in stays. The Allen was about, say, 300 feet from us when she opened astern of the Hawley, after the Hawley went about. The Allen was, may be, 75 or 80 feet from the shore, or may be more. The captain sung out hard-a-lee as soon *as soon* as we passed the Hawley's stern, so that we could tack. That was notice to me to light the sails. There was nothing then said on our vessel about the sloop that I heard. I was forward. We were a little nearer to the Hawley when we tacked this time than ever before. The others followed her
27 just as we did on the previous tack. Our vessel worked very well when she had a good head-way on her. She was a centre-board schooner. It was very little after the order hard-a-lee, if not at the same time with the order that I noticed the Allen change her course. We had commenced coming into the wind—the sloop commenced luffing a little bit—kind of yawned to just as we put the wheel down. She was 250 or 275 feet from us then; we were coming into the wind while she was changing her course; I didn't notice the man at the helm of the Allen; I heard no order given on the Allen; I said nothing to our captain about the Allen; the Allen's change was gradual; I thought a flaw of wind struck him, perhaps he may have changed his helm some, I don't know as he did. I don't hardly think the Allen continued her change till the collision. I couldn't be mistaken about the sloop luffing a little, because I particularly noticed it. (To the court.) I don't think there would have been a collision if that
28 hadn't happened. We were then still heading towards the Blackwell's Island shore, coming to the wind, going some four knots through the water; the tide must have been setting us down some five knots. I don't think I could possibly be mistaken as to the fact that the sloop had luffed—I was watching her—at the instant of the blow. I suppose we were heading, very litttle, if any, on the island; our boom was then about midships; the captain was hauling it over; the fore-sail was off some—about as far as the rail. We were compelled to keep off the wind some, on the last tack to the island to keep clear of the Hawley; when she went about, we kept off more to clear her; I suppose we must have been off two points then; that made us take a little longer to go about on that tack than if we had been close to the wind—we had not come into the wind any till the captain sung out hard-a-lee. We tacked right in the wake of the Hawley, and
29 were not carried nearer the island than she went. I noticed there were men on the sloop, but no one in particular. I think the Allen changed her course a point and a half; I didn't notice that she changed her course back again—she didn't keep changing. We were about 125 feet from the island when we struck the sloop. The sloop was about the same distance from the island; our boom was between 50 and 55 feet long; our sails never filled away on the tack; we drifted

with the Allen; the Allen sunk further out in the stream than where the collision occurred. I now think it was two hours that we were together before she sunk.

Re-direct:

At the blow our vessel was swinging to, coming to the wind.

Re-cross:

I am not familiar with Hell-Gate.

JOHN W. DUDLEY, being duly sworn and examined, says:

I reside in North Carolina; I am 22 years old; I have followed the water for the last ten years; I am now master of the Ella Dudley; I was on the Mary Eveline at this collision; I was a hand on her; I had
30 been on her about two months; I arrived in the city on Tuesday; came as a witness in this case; I was forward at the collision.

THURSDAY, *April* 22, 1869.

I saw the Allen before the collision; I can't say what tack we were on when I first saw the "Allen;" we made three or four tacks after we saw her, before the collision. I think the Allen was very close to the lower end of the island when I first saw her. She was running nearer to the island than to the other side. I can't say how near to the island she was running. The Allen had reached the end of the island when I first saw her. The tide was strong ebb, the wind about S. S. W. or S. W. by S., blowing very near through the channel, a seven to eight knott breeze. We had a reef in our mainsail. The schooner Hawley was just ahead of us; he got under way at Riker's Island—had been waiting for the tide there. We had no long leg beating down. The tacks were about equal. As we tacked to the Long-
31 Island , on the tack before the collision, the Hawley bore a little on our starboard bow nearly ahead of us. We were but a short distance from her when we tacked at the Long-Island shore. The Hawley didn't go quite as close to the Long-Island shore as we did. I suppose she went within 30 or 45 feet. We ran to within 20 or 30 feet—20 or 30 feet from our stern to the shore after we got about. The Hawley was all the time in sight. I was forward. I saw the Hawley when she commenced to tack on the Blackwell's Island shore. We had not got entirely filled away then. We had just *drawed* our jib. We hadn't got headway for Long-Island shore when the Hawley began to tack. Our stern was within 30 feet from Long Island shore when the Hawley first began to turn to make her tack on the Blackwell-Island shore. Our stern was then 100 feet from the stern of the Hawley. We had gathered headway perhaps a little; am not sure of that. When the
32 Hawley turned her broadside our stern pointed to near her foremast. We couldn't have tacked when the Hawley began to tack. We had no headway to tack with. We had headway when the Hawley got her broadside to us. The course of our vessel was changed to starboard. We kept off a little—no great deal; not over half a point. If we hadn't kept off we should have gone into the Hawley. The Hawley forged ahead, some ahead, in turning. The Hawley's main-boom didn't clear our rigging more than a foot. We saw the Allen as we tacked on the Long-Island shore. I suppose the Allen was running 75 to 100 feet off the island. The Hawley didn't go within 100 or 120 feet of the Blackwell's Island shore when she tacked. The Hawley didn't

run over ten or fifteen feet nearer to the island after she commenced turning her head to tack. We turned right in the wake of the Hawley. We didn't go nearer the shore than she did. Our captain sang out
"Hard-a-lee" as the Hawley's boom passed our fore-rigging. We
33 were crossing the tide at a rate of about three or four knotts.
The order of the captain was promptly attended to. We lost sight of the Allen when we came under the lee of the Hawley. The schooner shut her out. I had observed that the Allen had yawned off some from the island-shore before the Hawley shut her in. She came in view as soon as we opened her round the Hawley's stern. There was no time after the Hawley began to tack that the Eveline could have tacked before she did. We commenced tacking within 125 to 130 feet from Blackwell's-Island shore. About the time we commenced going about, the Allen luffed a point, probably more. We were about 125 to 130 feet from Blackwell's Island shore when the vessels came in contact. When we struck the Eveline was very near head down the river, swinging on one turn. When we struck the Allen she had
fell off towards the shore. She had luffed about a point or more
34 and then she fell off again just as we came together. When we struck, the vessels were almost head and head. Our starboard bow came into her starboard bow. Ten feet would have cleared us. There was no room for us to have gone inside and tacked between the Allen and the shore. When we began to swing, the Allen was between two and three hundred feet distant. The Allen was not going over one and a half to two knotts by the land. If the Allen had kept her course as she was when we opened her by the Hawley's stern, we might have come alongside—a glancing lick—but not to do any damage. There were no other vessels beating down that I saw. I saw no vessel but the Allen coming up. If, when the Hawley tacked on the Long-Island shore, the Allen had luffed hard enough to cross the stream, there would have been no collision. I saw no way for us to avoid the Allen after we went on the tack at the Long-Island shore. I let go the fore-sheet when the captain sang out
hard-a-lee. That was to get the vessel round as quick as possi-
35 ble—get her about quick by letting go the fore-sheet. I think that the fourth time I had been through there, our vessel was light. I think we were passing the island at the rate of about three to three and a half knotts. The wind pressed us up against the tide. Our speed on tack might have been four knotts. About all we made was what the tide carried us against the wind. When we kept off to avoid the Hawley, we might have got half to three-quarters of a point off the wind, as near as I can tell. If the Hawley hadn't been there we should have gained a little more on the tack than we did. We were a faster sailer than the Hawley. I think the vessels were in contact two hours or more. The Allen commenced to sink right away. Our jib-boom was caught in between her rigging and mast and held her up.

Cross-examined:

I suppose we went 150 feet after our stern pointed to the Haw-
36 ley's foremast till we passed her boom. We then headed over towards Blackwell Island. The Hawley was about head to wind when we were pointing to her foremast. I think she was shaking. She might have filled away, but hadn't much headway if she had. We were then, I suppose, about 100 feet from her when our stern pointed to her foremast. We were then just gathering headway. We had very little headway, if any. Our stern was then between 25 or 30 feet from

Long-Island shore. We then kept our vessel off a little as we passed the boom of the Hawley. The Hawley was heading across the river to the Long-Island shore—not square across—some on the Long-Island shore. We held on till our fore-shroud passed the boom of the Hawley. We came up as soon as we passed. We *was* not turning when we passed her boom. When we passed her boom we were nearer to the Blackwell-Island side of the river. I could then see the Allen from where I stood. The Allen was then heading rather on Long-
37 Island shore—rather off Blackwell-Island shore—her stern a point or a little more off Blackwell-Island shore. She was so heading when I first opened her behind the Hawley. The sloop was then between 350 and 400 feet off. When she opened by the Hawley the Allen was about four and a half points off our port-bow, and she was then about 125 feet from the Blackwell-Island shore. After the Allen opened I saw her change her course about a point to the eastward. She luffed. I saw her luffing as soon as we cleared the Hawley's stern. She was luffing when she opened. She luffed about a point or, perhaps, a little more. We were within 150 feet, or probably less, from the Allen when she stopped luffing. She then bore not more than quarter of a point off our port-bow—very near right ahead. She then fell off a little—not quite as much as she came to. I don't know that any one notified the man at our wheel that the Allen was luffing.

The Eveline was turning a little round the Hawley's stern when I
38 noticed the Allen was luffing. I let go the fore-sheet, and ran right forward, and saw the Allen luffing. I had not seen the Allen open by the Hawley when I lifted the fore-sheet. I saw her when I looked up. I had seen her before that. I went forward to help to tend the jib. I had not done that on the previous tack. I did it now to get the schooner about as quick as possible. No one told me to do it. I wanted to clear the sloop. I went forward to help at the jib-sheet. Generally the captain *gives* the order when the fore-sheet was to be let go. He sang out "Light up," and I let go the fore-sheet. I ran to the jib, and backed it out. I was busy. The wind was blowing so as to give me about all I could do. We commenced turning before the wind. The sails received the full force of the wind from *out of* the lee of the Hawley. The sloop could have luffed so as to avoid the collision if she had commenced in time. If, when the Hawley first tacked on the Long-
Island side, the sloop had luffed head across the stream over on
39 the Long-Island side so that we could have gone over to the Blackwell-Island side, we should have tacked then and gone around her stern between Blackwell Island and her. There was another way for the sloop to avoid the collision. If she had ran straight on her course down Blackwell-Island shore, that would have avoided the collision, I think. I couldn't tell for certain, but that is my judgment. I don't know as our bowsprit struck the Allen at all. Our jib-boom was jammed in between the mast and rigging on her starboard side. I am not positive as to that. If the jib-boom had gone between the mast and the larboard fore-rigging it would indicate that she hadn't fallen off any. I was standing on the traveller. I had dropped in, and jumped upon that to see whether we were going to strike. When I saw we were going to strike I ran aft. I had run to the port side, and stood right
40 to the rail. I could see the sloop better from there. As I stood to leeward I could see from her stern half-way forward or more on the Allen. When I went to the rail I thought she would clear us, going between us and Blackwell's Island. As soon as I got to the rail I saw she would hit. I suppose our mainsail was reefed to make our vessel

work better. It was from a seven to eight knott breeze. I think the sloop was going through the water from six to seven knotts. We, after we lifted the sheets, were going down one and a half to two knotts. There was not room enough for us to come in the wind between the sloop and the island. If we had tried to run up in the wind between the sloop and the island we would have run into the island. The Hawley forged ahead only about what the tide carried her. She was light. I think, when I jumped to the port-rail, I could see the starboard side of the sloop most. There was two men on that side by the main-mast, and I hallo'ed them to run.

41 JOHN W. PETTY, being duly sworn and examined, says:

I am one of the libellants; I hail from Brooklyn, Long Island; I am 41 years old; I have followed the water 30 years, mostly in fore-and-afters; I was master when 13 years old; I was not master again till I took charge of the Mary Eveline; I was in command of her at this collision. We left Riker's Island about 11 o'clock, when the tide turned. I took the helm, and kept it till the collision. It was a clear day, with a strong breeze from the southwest—a seven-knott breeze—a head wind from us. I didn't notice the Hawley till nearly the Flood Rock. We were obliged to head from Ricker's Island. We had single-reefed mainsail, full foresail and jib; & reefed mainsail, because, for my vessel, it was blowing too strong to carry full sail. I think the last tack, at the Long-Island shore, was the third tack I had made near the Hawley. There were two large vessels in the other channel, and we
42 therefore took the east channel. There was none but us two beating down the east channel, and only the Allen coming up the channel. At the collision the tide was the strength of the ebb—about two hours' ebb. I saw the Allen before the collision. I was standing to eastward, when I first saw the Allen, to Hallett's Cove—not yet down to the east end of Blackwell's Island. She was then a mile and a half below the island, and on the Blackwell-Island side of the river. I can't say how near she then was to the west side of the river. I kept her in sight after that. Her hull was hid by the Hawley part of the time. The Hawley was a little ahead of me, a little on my weather-bow, both standing to Long-Island shore on the tack before the collision. When the Hawley began to tack at Long-Island shore she might have been about the length of the schooner ahead of me. The Hawley went 30 feet from the shore as she swung round—30 or 40 feet. Our vessel is 160 feet long over all—that is, from the end of the
43 jib-boom to the end of the main-boom. I went rather nearer the shore than the Hawley did. My vessel was gaining on the Hawley. When my vessel filled away at Long Island my stern swung about 25 feet from the shore. I was at the wheel. I could see the Hawley from where I stood. I saw the Hawley tack at Blackwell Island. We had filled away when the Hawley commenced to change. Our stern, when we filled away, was 30 feet from Long-Island shore. As near as I can judge it was 150 to 160 feet from our jib-boom to the stern of the Hawley. We had just begun to gather headway then. I observed the Hawley swing her broadside to. Our jib-boom ranged right for her fore-mast then. We couldn't then have tacked, because there was no way on the vessel and there was no room to tack, we was so close to the Long-Island shore. I should have wanted three-quarters of the river to have filled away and then tack back on Long-Island shore. I kept my vessel off when I saw the Hawley ahead of me, broadside to my jib-boom. If I had kept on I should have

44 struck her. The Hawley's hull was a little aft her main-mast. My fore-shroud cleared the Hawley's main-boom not over two feet—I don't believe more than six inches. I thought it was going to catch. The Hawley tacked something like 150 or 125 feet from Blackwell-Island shore. I tacked about the same distance from the shore. I did not run in any closer than the Hawley did. I tacked right in her wake. As I went under the Hawley's stern my schooner was luffing, and when I cleared her main-boom I sung out, hard-a-lee. John Dudley let the fore-sheet go, and the mate let the jib-sheet fly. The steward was aft, helping me to haul the main-boom over. This was all to get the vessel about as soon as possible, so as not to interfere with the sloop's coming up on the west side of the river. My vessel acted as quick as usual. I didn't then think there would be any collision. I most assuredly supposed the sloop would go to the Blackwell-
45 Island side. There was plenty of room for her to go to the Blackwell-Island side. We couldn't have wore the ship there, The tide under her lee-bow, with her helm hard up, would have cut her ashore on Blackwell Island before she would have kept off. When the sloop came in range of the Hawley I think she was 80 to 100 feet of the island and b'low us. I didn't see that the sloop luffed till I came out from the Hawley's stern, and then I saw that she was further from the shore. She was then headed about one point in the river, or something like that. She kept that luff till almost to the collision. I sung to the captain of the schooner and told him to keep off. He rolled his wheel up, and the vessel kept off a very little. The vessels then couldn't be helped. The vessels were close together. Ten feet would have cleared the vessels. I judge my bow was about 100 feet from the shore at the blow. We were then almost headed down the river. The sloop was then heading a little towards the island, not quite par-
46 allel with the stream. If she hadn't luffed there would have been no collision. She came right under our bow; her starboard cat-head struck our stern and her bowsprit was broken off. It struck a little forward of our fore-chains and seemed to be pried off, and our jib-boom went between her mast and fore-rigging. I can't say which side of the mast. We could do nothing to avoid the collision. We couldn't have tacked before we did and cleared the Hawley. The Hawley was about our size. I am in the habit of going through the Gate. I know now the captain of the Allen. I never saw him before the collision. (He is one of the claimants.) I had a conversation with him on my schooner after the collision—a month after the collision.

APRIL 23D, 1869.

Cross-examined:

My vessel was something like 100 feet from the Hawley when my stern pointed to the foremast of the Hawley—it was between one and two hundred—a length and a half or so from us. The Hawley
47 had then just payed off. She was about ready to start ahead. The sloop was then down the river from the Hawley, ranging ahead of the Hawley's sails from me. I could just see the sloop ahead of the Hawley, that is, in range I should say. The sloop was then 400 feet from the Hawley. The Hawley's stern was then something like 150 feet from Blackwell's Island *then*—she had just tacked. The Hawley was then about six points off the wind, heading diagonally across the river. The wind was S. W. We had then just filled away and were, perhaps, within six points of the wind. We can lay within five points when

under good headway, and sails well trimmed. As my vessel drawed ahead I kept her off, say half a point, to clear the Hawley, then still heading down across the river close-hauled was then within two or three points of straight across the river. I begun to let my vessel luff the moment I saw I could clear the Hawley. The hull of the sloop could not then be seen for she was deep and the schooner was
48 between us. I could see her sails right in range of the Hawley. I saw her hull as soon as I opened her by the Hawley. I was then luffing. I did not notice that the sloop was luffing till I came out from under the stern of the Hawley. I saw then she had luffed. She was then 200 or 250 feet from me, a little on my weather-bow. The sloop was then something like 100 or 125 feet from *the* Blackwell Island. I should think she was 125 feet from the island. I was on a circle luffing. The sloop was then nearer Blackwell's Island than I was. It was then I swung my hand to the captain of the sloop. I was then 200 to 250 feet from the sloop. The Hawley was then standing across to the Long-Island shore. I swung my hand as soon as I perceived the sloop had luffed. Soon as I saw her I swung round by the Hawley's stern. It first seemed to me that the sloop luffed as fast as the schooner did. She kept luffing till within about 70 feet and then rather turned to the westward as they came together. We struck her about over her
49 cat-head about eight feet from her breast-hook. At the blow my forward sails were lifting in the wind. The main boom was hauled to windward and had got midships, I think. I think the sloop was 100 feet further from the shore at the collision than she was when 60 rods below. Very little luff, in that tide, would change her rapidly. I observed no change in the helm of the sloop till I thought I saw the captain roll the wheel up. No vessel with that wind and tide, under that sail the sloop had, could be kept straight—because it was blowing a very fresh breeze right off. The main-boom was off on our port side—she was deep and drove against a current so strong that her bowsprit was not 18 inches from the water. She would yaw—I say this from my experience on sailing-vessels. I have never sailed this sloop. It would take an excellent helmsman to keep her within a point of her course. I have sailed longest in sloops, furtherest in ships, and last in schooners; long enough in any of them. I should say I was 100
50 or 150 feet from the Long-Island shore as I begun to turn at the tack on that shore. I came about much on the usual gait—came around our usual way of coming. I did not notice whether the sloop's peak was slacked. If it was slacked it must have been but a very little or I should have noticed it. I noticed that she had clewed up her topsail, but I never noticed that her peak was dropped. If it was it must have been a very little. I am familiar with the Gate; have navigated it, off and on, for 30 years. The sloop sank very rapidly after the blow—I should say in five minutes she was on the bottom; but our rigging was caught and we were held by her for an hour and a half or two hours. My vessel will tack in 250 feet in such wind and tide as this was.

Re-direct:

The sloop wouldn't have had to luff two points to clear both vessels if she had begun when the Hawley began to luff at the Long-
51 Island shore. When a vessel yaws, she goes first one way then the other. When I say it would be difficult to keep her within a point of her course, mean half a point either way. The sloop and we were at the collision approaching each other at a speed combined of about eight miles an hour.

MONDAY, *April* 28, '69.

BARTLETT HORTON, being duly sworn and examined for libellant, says:

I was 18 years old last November. I follow the water. I hail from Patchogue; have followed the water for the last four years. I was on the Mary Eveline at the collision. I was steward on the Mary Eveline. I was tending the main-sheet. I saw the Ethan Allen before the collision. She had then just gone about on the east side. I saw no other vessel but her head east; none but the Hawley near us, beating down. The first I saw of the Allen was when we came round on the Long-Island tack. The Hawley tacked first on the Long-Island shore.
52 She was ahead of us, a little on our weather-bow, when she commenced to tack. She was between 2 and 300 feet from us when we commenced to tack. I was aft on our vessel when we began to tack, and remained on deck till the collision. Our stern was, say, 25 feet from the Long-Island shore when we tacked at Long-Island shore. After we got headed on a course towards Blackwell's-Island shore, the Hawley bore a little on our weather-bow; about 200 feet from the Hawley's stern to our jib-boom then. I had then seen the Allen. I saw her after we commenced tacking on the Long-Island shore. I should think she was coming along about 100 feet from Blackwell-Island shore. She was down the river, a little off our weather-bow. Our stern was then about 25 feet from Long-Island shore. I saw the Hawley commence to tack on the Blackwell-Island shore. When she began to tack I think she was about 200 feet from the Eveline. I saw the Hawley when she got broadside nearly turned to us. Our stern then pointed very
53 near for her foremast. We then rolled our wheel up and kept her off so as to pass the Hawley's stern. Had then got from 3 to 400 feet from the Long-Island shore when our wheel was rolled. The Hawley turned nearly 150 feet from the Blackwell-Island shore. After we kept off we were heading little down river, not directly on to the island. We just cleared the main-boom when we tacked. Our fore-rigging went within two feet of the main-boom of the Hawley. We didn't stand any nearer to Blackwell-Island shore than the Hawley had. We couldn't have tacked before we did. The order was from the captain, hard-a-lee. The Allen was shut out from our view partly when the Hawley tacked. I was then tending the main-sheet. As soon as we shot past the Hawley's stern, I noticed the Allen again. She was then about the same distance from Blackwell-Island shore that she was when I noticed her before. I had not noticed any change in her up to that time. I
54 saw her luff before the collision. When I saw her luff she was about 400 feet from us down the river. We had commenced to tack when I saw her luff. I didn't notice that she changed her course again before the collision. She luffed about a point and a half and then steadied for a little ways. I think she then kept off a little before we came together. She was about a length off then, I think. I saw some one at her wheel when we went about. I saw our captain swing his hand. It was just after he had sung out, hard-a-lee—was coming around. We had then luffed. I saw the man at the Allen's wheel leave his wheel. That was after I saw her keep off. The collision took place within 100 feet from the shore, I should say. I think the Allen kept off about as much as she luffed. We were right on line with where *where* the Hawley had tacked at the time we struck her. The Hawley had then gathered headway and was standing on her tack half way across the
55 river. It was blowing about a seven-knott breeze. We were cross-

ing the tide at a rate of about five knots. The combined speed of the Eveline and the Allen, at the collision, was about 9 or 10 knots. Fifteen feet change would have cleared us, easy enough. We couldn't come around any quicker than we did. There was not room to tack between the Allen and the island. The two vessels came together, our stern striking her cat-head on her starboard-bow. Our jib-boom went on the starboard side of the Allen's mast. The wind was about S. W., blowing right up the channel, the tide a strong ebb. I judge the river to be between 5 and 600 feet wide there. I am not attached to the Eveline now. The collision was just near the lunatic asylum. We were a little past the dock. I remember leaving the dock. We had got about our length past the dock.

Recrossex'd:

We were within 100 feet of the Long-Island shore when we commenced our tack on that shore. I think we were 75 feet off when
56 the sails shook, and were 25 feet as our stern swung around and we filled away. We went about with usual speed on that tack. The Hawley was about 100 feet from Blackwell's-Island shore when she went about. That was the nearest she went to the shore. The Hawley was in the middle of the river, when our stern was pointing to her foremast. She was under full headway. She had run some 200 feet on her tack, when we rolled our wheel up. She was then 300 feet from the shore. I guess the Hawley was 300 feet from Blackwell-Island shore when our fore-shroud passed her main-boom, and the instant our shroud passed the boom, our captain rolled his wheel down and sung out hard-a-lee. We were then about 100 feet from the shore. I helped to pull the boom over as soon as the sails shook. We hauled it over with a crotch-rope and not with a tackle. I was standing on the lazy-board. I saw the sloop when she commenced luffing. I think she had then opened un-
57 der the stern of the Hawley. I don't know what I was doing at that time. I was then on the quarter somewhere, but can't say whether to windward or leeward, or midships. The captain had not then sang out hard-a-lee. When I noticed the man leave the wheel on the Allen, our jib was backed out to leeward, and the other sails were shaking. I was then on the quarter—was then pulling over the boom, and on the port side. I asked the captain if he saw the sloop, and he said he did. This was while I was hauling the boom over, and the sails were shaking. I don't know that I had heard any one on our vessel speak of the sloop. I suppose our stern was then swinging round. Our bow might have been 150 feet from the Allen when I saw the man leave the wheel; I can't tell exactly. I am sure our bowsprit went on the starboard side of the sloop's mast. I don't know whether we tore the sloop's mainsail. I didn't call the captain's attention when I saw the sloop was luff-
58 ing, nor did I hear him speak of it, as I recollect.

Re-direct:

We didn't stand on any after our shroud passed the Hawley's boom. The Hawley had then gathered headway. We were then not far from 150 feet from the Blackwell-Island shore. The Hawley was then outside.

Re-cross:

When I saw the man run from the wheel, the sloop was, if anything, a little on our starboard bow, about ahead. The Hawley was always further down the stream than we were. Her bow was not to leeward of our course at any time after she came about.

JAMES SIMMONS, recalled and examined, says:

We could by turning at once from the Long-Island shore have gone up the river, but I don't think we could have again got round on our course.

Libellants rest.

Deposition of Charles Bennett, for claimant, read.
" of John M. Andrews, for " "

59 HENRY B. MERRILL, being duly sworn and examined, says:

I am one of the claimants. I reside in Greenport, Long Island. I have followed the water 31 years; have been master of a vessel for the last 15 years, passing through the Gate from spring to fall, every year. I was master of the sloop Ethan Allen, and part owner of her. I was at the time bound to Middletown, Connecticut, loaded with half fine sand and half fine clay, deep. The sloop was 75 tons. I judge her length 125 feet over all. I had two men besides myself. I was at the wheel, and the others stood close by me, on the starboard side of the quarter-deck. We entered the channel by the south end of Blackwell's Island, about one and a half o'clock p. m. The wind was S. W., pretty near through the channel. Our boom was on the port side. We had mainsail and jib-peak settled, & was steering along on the west side of the channel under Blackwell Island. There was about a seven-knott breeze. The island is, I should judge, three-quarters of a mile
60 long. I was sailing about 70 or 75 feet from the island. I go so near to keep in the eddy tide. The tide was ebb, running strong. I observed two schooners beating down. I was about half way up the island when I first saw them. They were then just coming by the east point of Blackwell Island, and were then on the starboard tack, standing to the eastward towards Long Island. I did not lose sight of them after that till the collision. I think they made one more tack to Long Island in addition to the one they were on when I first saw them. They proved to be the Mary Eveline and the Hawley. On their last tack to the Long-Island shore the Hawley was ahead but a little. The Eveline tacked right under the Hawley's stern, and fell into the Hawley's wake, a little to the leeward of her, and both vessels stood on. At this time I was close under Blackwell Island, ranging up the river off their port bow. I stood on my course. The two schooners kept their
61 courses until the Hawley had stood out her tack. Then she put her wheel down, and came around. When she was in the wind I was off her port bow towards the island. At that time the Eveline kept off and went round to the leeward of the Hawley. I should think she went a point and a half, full, from the wind in passing to the leeward of the Hawley. While the Hawley was in the act of filling away, the Eveline came out around her stern. I saw the captain of the Eveline put his wheel down. The Hawley tacked outside of the sloop about 50 feet, the sloop being then about 75 feet from Blackwell's Island. In about one minute after I saw the captain of the Eveline put his wheel down, she struck the sloop in her starboard bow, near the cat-head, stern on, her flying-jib-boom passing to leeward of my mast, passing between the lee rigging and mast, and through my mainsail. This diagram shows the positions of the vessels at the blow.

(Diagram marked Exh. 1, C. L. P.)

62 The Eveline was about 125 feet from Blackwell's Island when I noticed her open by the stern of the Hawley. She put the helm

down as soon as she opened by the stern of the Hawley. The Eveline was then heading very near on to the island, and one point free from the wind, heading a little down, probably not over one point from directly on the island; she might have been a little more than that. The whole of the Eveline came in sight by the Hawley before she commenced luffing; otherwise I could not have seen the captain when he put his wheel down. She shot on beyond the track in which the Hawley turned. She went about 50 feet nearer the island than the Hawley did. Under the circumstances it was necessary that the Eveline should go nearer than the Hawley did. She would lose her way a little when under the lee of the Hawley, and when she took the breeze again it must first catch her head-sails, and so cut her in nearer the shore. She wouldn't turn as quick as
63 if there was nothing to take her wind. When the Hawley put her helm down to go about, the Eveline was about a length and a half from her. The Eveline should have put her wheel down when the Hawley did, and come in stays. She had room to do so—there was nothing to prevent it. The Eveline had then gone nearly across the river, after falling away on the Long-Island shore, when the Hawley tacked. The Hawley stood her full tack out. I mean she stood as far as she would if the sloop had not been there and keep' in true tide. In beating in the tide, it is necessary to keep out of the eddy; otherwise the eddy might take them ashore. My boom was about 55 feet long. It hung about two points abaft my beam on the port side. The end of it, as I passed along, while the schooners were tacking on the Long-Island shore, was from 10 to 15 feet from the island. When the Eveline began to luff she was outside of my course. She was then
64 probably 200 feet from my vessel. After she put her helm down she kept approaching the island. When we struck, the combined speed of the vessels was about nine knotts. I did not leave my helm. Harton was mistaken when he said I lett my helm. I did not luff at any time, nor did my vessel yawn. The libellants' witnesses are wrong about that. I did not keep away because it would have exposed me more to the bow of the Eveline. The sloop wouldn't have luffed to exceed a point in that short distance. At the blow I was about 75 feet from Blackwell's Island. I saw the Allen when she was raised. She has been raised. It showed the blow close to the starboard cat-head, about seven or eight feet from her stem. The hole was a crush right in. It was diagonally across the bow. The collision occurred just below the dock—the lunatic dock. I made the river, by the chart, 740 feet wide there. I didn't see the captain of the Eveline wave his hand to me.

65 Cross-examined:

My sloop was 41 tons measurement. Her width was 20 feet. I do not own her now. She is still in existence—sailing. The length of the Eveline and the Hawley, over all, was about the same, say 160 feet each. When close-hauled the boom is generally over lee davit. There is an eddy, at that stage of the tide, by the Blackwell-Island shore, about 75 feet wide. The tide don't set in an opposite direction, but is a slacker tide. There is no slack water on the Long-Island shore there with ebb tide. I had the wind free. I didn't change my course at any time after I saw these vessels. I made an effort to avoid them by keeping close to the island. I did nothing to avoid them, but keep my course. I saw they were beating when I first saw . They continued to tack up to the collision. I saw, as they crossed to Long Island, the Eveline was a little to the leeward of the Hawley. The Hawley tacked

first. When the Hawley got round on her tack, at Long Island, she was 100 to 150 feet from Long Island; when she got round
66 she was not nearer to the shore than 100 to 150 feet. I noticed that the Eveline went round the Hawley's stern at the Long-Island tack. When she went round her stern, the Hawley had filled away at Long-Island shore; that brought the Eveline considerably nearer to the Long-Island shore; probably she went within about 50 feet of the Long-Island shore. I observed all this. The Hawley was drawing ahead on her tack, while the Eveline was coming about on the Long-Island shore. The Hawley crossed the tide towards the Island, perhaps at a rate of five knots, after she got headway on her. The Hawley was perhaps 200 feet from Long-Island shore when the Eveline was in the wind before she got filled away on her tack, or 250 feet. When the Eveline got filled away on her tack, the Hawley might have been from 300 to 350 feet from the Long-Island shore—I mean her stern, 300 to 350 feet from the shore. The distance between the Eveline and the Hawley, at the time the Eveline got filled away, *they* may have been 200 feet *apart*; that is, from the end of the jib-boom to
67 the stern of the Hawley. The Eveline was then a little to the leeward of the wake of the Hawley. The Hawley commenced to tack when she was 150 feet from the Blackwell-Island shore. The Eveline kept away just about the time the Hawley commenced turning; as she turned she hid the Eveline from me. The Hawley had not filled away, but was filling away as the Eveline's stem came to her stern. She was forging ahead some. A vessel's stern does not swing further than her bow in any state of the tide in tacking under headway. I saw the captain of the Eveline put his wheel down. He hadn't put it part down before, because, if he had he would have hit the Hawley. The Eveline had a standing-wheel, I think. I am not sure. No part of the Eveline was at any time inside of me, between me and Blackwell-Island shore. I thought there would be a collision as soon as I saw her begin to tack. The Hawley had commenced drawing ahead when I saw the Eveline's wheel hove down. There was no time after the Eveline com-
68 menced swin'ing that she changed the swing. I was swinging slowly when we came together.

Re-direct:

When I saw the vessels tacking about the Long-Island shore I was not in a position to luff off to the Long-Island shore.

Q. Why not?

A. After the vessels had drawn across the river towards me I could not luff off. There was not room enough. They were drawing down river. I was 500 or 600 feet below them. When they tacked I was going about five knotts, and the Hawley the same speed.

69

70 United States district court for the eastern district of New York.

JOHN W. PETTY AND ISAAC HOMAN
against
HENRY B. MERRILL AND OTHERS.

It is hereby stipulated that a certified copy, certified by George F. Betts, esqr., of the depositions this day taken in the suit of Henry B. Merrill and others, against The Schooner "Mary Eveline," her tackle,

&c., in the southern district of New York district court, before the said Geo. F. Betts, esqr., U. S. commissioner, may be filed with the clerk of this court, and may be read on the trial of this action, the same as if they had been duly taken in this action and were original depositions of the witnesses.

Dated February 5th, 1869.

RICHARD H. HUNTLEY,
Proctors for Claimants.
F. A. WILCOX, *for Libellants.*

71 UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered that on this fifth day of February, in the year of our Lord one thousand eight hundred and sixty-nine, I, George F. Betts, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812; and the act of Congress entitled, "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817; and the act entitled "An act to establish the judicial courts of the United States," passed September 24, 1789, did call and cause to be and personally appear before me, at my office, at No. 41 Chambers st., *street*, in the city of New York, in the said southern district of New York, in the State aforesaid, Charles Bennett, to testify and the truth to say, on the part and behalf of the libellants, in a certain suit or matter of controversy, now depending and undetermined in the district court of the United States for the southern district of New York, at New York, wherein Henry B. Merrill et als. are libellants, against The Schooner "Mary Eveline," her tackle, &c. And the said Charles Bennett being about the age of 40 years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Charles Bennett, and he did thereupon depose, testify, and say, as follows, viz:

I live at Sag Harbor. I am a sea-faring man, engaged in coasting business; expect to go to sea March 1st. Sag Harbor is more than 100 miles distant from the southern district of New York. In September last I was master of the schooner "Charles Hawley." I witnessed a collision on the 20th of September, 1868, between the sloop "Ethan Allen" and the schooner "Mary Eveline," betwixt Blackwell's Island and Long Island—2 to 3 o'clock p. m. We were bound to the westward.

72 The wind was ahead to us. We were tacking across the river from one side to the other. The tide was ebb, running strong—about two-hours' ebb. The "Mary Eveline" was in company with us. She was also beating down within hailing distance of us most of the time. For two tacks the "Mary Eveline" had been so near to us that she went around our stern to tack when we were in stays. When we were standing over from Long Island towards Blackwell's Island, we were both on *our* tack—the "Mary Eveline" a little to windward of us, but almost in a line astern of us, and about four of our lengths distant from us—that is, about 450 feet. At that time the Ethan Allen was coming close along by Blackwell's Island, running about northeast, with

a fair wind, parral'el with the Blackwell's-Island shore, and about 75 feet off from that shore. Her boom was off her port side. I tacked at about 170 feet off from Blackwell's Island, to go towards Long Island, and at that time, when I came into the wind, the sloop was a little distance ahead of us, and a little inshore of us, and probably 300 feet west or southwest of a line from us to Blackwell's Island. The "Mary Eveline"
73 then kept off to go around our stern. When she was abreast of our stern the "Ethan Allen" had lapped on to our bow. The captain of the "Mary Eveline" put his helm down to go about. Then the collision occurred, as the "Mary Eveline" was in the act of going about. The bow of the "Mary Eveline" struck the sloop about half way of its bowsprit, and the head-gear of the "Mary Eveline" went in between the mast and the lee rigging of the sloop. At the time of our tacking the sloop was 75 feet distant from Blackwell's Island. She did not change her course after that. When I first discovered the "Ethan Allen" I was off the east point of Blackwell's Island, half a mile from the sloop. I made one tack from Blackwell's Island to Long Island, and another from Long Island to Blackwell's after that, before the collision. During all this time the "Mary Eveline" was following us, tack and tack. There were no other vessels in that vicinity. The tide close under the Blackwell's-Island shore is weaker than further out in the river.

Q. What is the usual and proper course and position for vessels to take when going east with a fair wind against a strong ebb tide?

(Objected to)

74 A. It is their place to keep out of the strong tide as much as possible. To do that, she would go under the shore, where the tide is not so strong.

Q. When the "Mary Eveline," at the time of your last tack before the collision, went around your stern, and luffed up, how far was she from the "Ethan Allen?"

A. They were together. The "Mary Eveline" was in the act of turning to the windward. They came together as the "Mary Eveline" was in the act of turning. The "Ethan Allen" did not change her course, clear down to the time of collision.

Q. Could the "Ethan Allen" have done anything then to avoid the collision?

A. I don't think she could (objected to) in the position the vessels were in.

Q. Suppose the "Ethan Allen" had luffed, what would have been the effect?

A. The "Mary Eveline" would have hit her, because she was in the act of turning, which cut the sloop off from luffing.

Q. Suppose the sloop had kept away?

A. It would have made it worse, because the sloop would expose its broadside, and they would be coming together. The "Mary Eveline" wanted all the room there was there to turn around in.

75 Q. Under the circumstances, what should the "Mary Eveline" have done?

A. She ought to have gone about when I went about. In that case, there would not have been any collision. During all the time after I saw the "Ethan Allen," she and the "Mary Eveline" were in sight of each other. I had beaten out my tack at the time I last went about.

Q. State whether it is usual for vessels in beating down that river, as you then were, to stand nearer the Blackwell's-Island shore than from 150 to 200 feet?

(Objected to.)

A. No, sir; it is not usual. The effect of this collision was that the sloop sunk in 5 or 6 minutes, in about 5 fathoms of water.

Cross-examined by Mr. Wilcox:

It was 75 feet from the point of collision to the Blackwell's Island shore. I should call the river there a quarter of a mile wide. I think the river is 5 or 6 fathoms deep there. The water is deep close to the Blackwell's-Island shore. The shore is bold. I stood within 100 to 150 feet of the Long-Island shore in running my tacks. The Blackwell's-Island shore is the boldest. The water on the Long-Island shore
76 is deep. In tacking down, the "Mary Eveline" had been following the "Hawley" closely on all her tacks. I should judge the "Mary Eveline" was 150 feet long, from the end of the flying-jib-boom over all.

Q. If the "Ethan Allen" had kept off at the time the "Mary Eveline" commenced her tack, would the collision have been avoided?

A. No, sir; she was within 75 feet of the island, and could not have gone through that.

Q. Suppose she had taken the other course?

A. Then we should have hit her on the other tack; I mean on our other tack.

Q. Was there room for the "Mary Eveline," after passing around your stern, to have gone between the sloop and the Blackwell's-Island shore?

A. There was not room, the way they worked, for her to pass. If her captain had given the "Mary Eveline" a longer sweep, so as to fetch her head to the wind along the island, I think he could have done it, but it would have been close. The "Mary Eveline" was in the act of going about as she passed our stern, and we were just filling away. She went about as soon as she could after passing our stern. The "Ethan Allen" sunk in the middle of the river, about ½ of a mile from the points of collision. I saw Captain Merrill next day. We had some talk about this collision.

Q. Did he or not say that the "Mary Eveline" could have
77 gone between the "Ethan Allan" and the Blackwell's-Island shore?

A. He said he did not think there was room.

Q. Was there any other course the "Mary Eveline" could have taken than to attempt passing around your stern and tacking as she did?

A. She should have tacked when the "Hawley" did.

Re-direct:

I have followed the water 24 years, and for 20 years have been familiar with the navigation of the East River.

CHARLES P. BENNETT.

Subscribed & sworn to this 5th day of February, 1869, before me.

GEO. F. BETTS,
U. S. Commissioner.

78 UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered that on this fifth day of February, in the year of our Lord one thousand eight hundred and sixty-nine, I, George F. Betts,

a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812; and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817; and the act entitled "An act to establish the judicial courts of the United States," passed September 24, 1789, did call and cause to be and personally appear before me, at my office, at No: 41 Chamber' street, in the city of New York, in the said southern district of New York, in the State aforesaid, John M. Andrews, to testify and the truth to say on the part and behalf of the libellant' in a certain suit or matter of controversy now depending and undetermined in the district court of the United States, wherein Henry B. Merrill & als. are libellants, against the schooner Mary Eveline, her tackle, &c.

And the said John M. Andrews being about the age of years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said John M. Andrews, and he did thereupon depose, testify, and say as follows, viz:

I live at Sag Harbor, more than 100 miles from the southern district of New York. I am a sea-faring man; expect to go to sea in March. In September last I was acting as first hand on the schooner Charles Hawley. I saw the collision. It occurred in the East River. The vessel was bound towards New York. We had a head wind and ebb tide. I saw the Mary Eveline all along as we came up. She came through the Gate to leeward of us, and gained on us fast. I first saw the sloop
Ethan Allen when we were very near Mill Rock, after we hauled
79 in around Hallett's Point. Then the whole river was open the whole length of Blackwell's Island. I should judge the sloop was about ⅓ of the way up the island when I first saw her, on the west side of the river, close under Blackwell's Island, in the east channel. I judge she was 70 to 75 feet from Blackwell's Island. We continued beating on down. When we tacked last on the Long-Island shore the Mary Eveline was close to us, and kept away a little, to clear our stern. After we had tacked she came around nearly astern of us, a very little under our lee. We then stood on, made our tack out, and then we came about. We came to about 140 or 150 feet of Blackwell's Island. We stood our tack out. The Ethan Allen was then close in under Blackwell's Island, coming up before the wind, about 300 feet off from us when we tacked. When we had filled away she was not over 200 feet down the river from us. She was 70 or 75 feet off the Blackwell's-Island shore. The tide was then sagging us down to her very fast.
When we tacked at Blackwell's Island the Mary Eveline kept
80 off across our stern, and as soon as she went past our stern I saw her captain let go the wheel and let the vessel come around, and she continued luffing, and luffed right into the Ethan Allen, struck her on the bluff of the starboard bow, abreast, as near as I could judge, of the starboard cat-heads of the sloop. The Mary Eveline struck head on. At that time, I should say, the sloop was not over 75 feet from Blackwell's-Island shore, at the outside.

Q. Could the Ethan Allen have done anything to avoid the collision?

A. I don't see how he could have gone to work to have done it; not in the position he was placed in.

Q. Could the Mary Eveline have avoided the collision?
A. I don't see how, under the circumstances in which she was placed.
Q. As they were placed—when do you mean?
A. After the Mary Eveline had crossed our stern.
Q. Before that could the Mary Eveline have done anything to avoid the collision?
A. I think she could.
Q. What could she have done?
A. Gone about when the Cha's Hawley did.
81 Q. Was there anything to prevent her going about when the Hawley did?
A. No, sir; I don't think there was; nothing that I could see.
Q. After the Mary Eveline passed the "Hawley's" stern, did the Ethan Allen change her course?
A. No, sir; if she did it was so little that it was not perceivable.
Q. If the "Ethan Allen" had kept away, what would have been the effect?
A. She would have exposed her broadside to the head of the "Mary Eveline" and have sunk a great deal quicker than she did.
Q. If the "Ethan Allen" had luffed, what would have been the effect?
A. I don't see that it could have bettered it any; she would have struck her more head on, or on the other bow. I have been acquainted with the navigation of the East River 6 or 7 years; have been master 4 years. When the tide is running ebb it is a great deal slacker close in shore than out in the river.

Cross-examined by Mr. Wilcox:

The jib-boom of the "Mary Eveline" ran between the mast and the lee rigging of the sloop. The tide then caught them, the sloop's mainsail being still up, and drifted them out into the middle of the river where the sloop went down head first, its rigging hanging by the schooner's jib-boom.
82 Q. Was there room enough for the "Ethan Allen" to have gone a few feet nearer to Blackwell's Island, and thus to have avoided the collision?
A. I should not think there was. He was running about as nigh the land as was safe.
Q. About what change of the "Ethan Allen" would have avoided the collision at that time?
A. I couldn't see any that would have, under the circumstances.
Q. Before the time of the collision could the "Ethan Allen" have so changed her course as to have avoided the collision?
A. What time do you mean?
Q. I mean before the "Mary Eveline" put her helm down.
A. No, sir; when the "Mary Eveline" was under our stern, the "Ethan Allen" was going about three (3) knots past the land. She had her mainsail set, main-sheet off full length, boom off port side with her main peak slacked a little, her main top-sail was clewed up and hanging. I couldn't tell whether any effort was made or not on the sloop to avoid the collision. I don't see how they could do anything. I saw
83 them on board the sloop on the quarter-deck just previous to the collision—the captain at the helm. He remained at the helm till she struck.

Redirect:

The "Mary Eveline" was under her three sails, jib, foresail, & mainsail.

I thought she worked very well in her tacks. The wind was about a six-knot breeze, a good working breeze.

Recross:

I couldn't swear whether the mainsail on the "Mary Eveline" was reefed or not; I don't think it was.

J. M. ANDREWS.

Subscribed & sworn to this 5th day of February, 1869, before me
GEO. F. BETTS, *U. S. Com'r.*

84 UNITED STATES OF AMERICA,
Southern District of New York, ss :

I, George F. Betts, a commissioner, duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the act of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes, depending in the courts of the United States," passed February 20th, 1812; and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817; and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify that the reason for taking the foregoing deposition' is, and the fact is, that the witnesses' testimony is material and necessary for , in the cause of action mentioned in the caption hereof, and that the witnesses live at a greater distance from the place of trial of said cause than one hundred miles, and that they reside out of the southern district of New York, the place of trial of said cause.

I further certify that due notification of the time and place of taking the said deposition', signed by me, was made out and served on the proctors for the claimants to be present at the taking of the deposition' and to put interrogatories, if he or they might think fit.

I further certify that on the 5th day of February, A. D. 1869, I was attended by the proctors for the respective parties, and by the witnesses, who were of sound mind and lawful age, and the witnesses were by me carefully examined and cautioned, and sworn to testify the whole truth, and the depositions were by me reduced to writing, in the presence of the witnesses, and from their statements, and after carefully reading the same to the witnesses they subscribed the same in my presence. I have retained the said depositions in my possession for the purpose of *filing* the same with my own hand to the court for which the same were taken.

I further certify that I am not of counsel or attorney for either of the parties in said deposition' and caption named, or in any way interested in the event of the said cause named in the caption.

In testimony whereof I have hereunto set my hand and seal this fifth day of February, in the year of our Lord one thousand eight hundred and sixty-nine, and of the Independence of the United States the ninety-third.

GEO. F. BETTS,
U. S. Commissioner, Circuit Court of the U. S. for the Southern District of New York.

85 (Indorsed:) U. S. district court. Henry B. Merrill & als., vs. The Schooner Mary Eveline. Deposition, de bene esse, for . Taken before me, this 5th day of Feb'y, 1869.

86 United States district court, eastern district of N. Y.

JOHN W. PETTY
vs.
HENRY B. MERRILL ET AL.

Before Hon. Judge Benedict, April 27th, 1869.

THOMAS BRENNAN, sworn on behalf of respondent.

Examined by Mr. Huntley:

Q. What was your occupation last Sept.?
A. Steward, on Blackwell's Island; had charge of the guard.
Q. Had charge of the guard-boat?
A. Yes, sir; on the eastern channel of Blackwell's Island.
Q. As such, what was your business?
A. Pulled up and down the river and looked out for a boat on this Sunday coming along to take away prisoners.
Q. This collision was on Sunday?
A. Yes, sir.
Q. Did you see this collision?
A. Yes, sir.
Q. State where your boat was.
A. About 25 feet from Blackwell's Island, and about 50 feet from where the collision occurred, between lunatic-*island* dock and the retreat.

87 Q. (By Mr. BEEBE:) Fifty feet nearer the shore?
A. 25 feet from the shore, and about 50 feet up from the collision.
(By Mr. HUNTLEY:) Q. By "up" you mean which way?
A. Towards Hell Gate. The tide was running down.
Q. When did you observe the two schooners first that you saw?
A. When they were coming across from the Long-Island shore towards the Blackwell's-Island shore.
Q. You are now speaking of the last tack they made towards Blackwell's Island, before the collision?
A. Yes, sir.
Q. Did you at that time notice the sloop?
A. Yes, sir; I noticed the sloop.
Q. How far was the sloop from Blackwell's Island at that time?
A. 70 or 75 feet, I guess.
Q. Was she within what is called the eddy?
A. Yes, sir; she was in the eddy.
Q. How far out does that eddy extend?

88 A. It extends out about 70 feet at that point where he was. There are places along the island where it don't come out two feet. The eddy runs right along the wharf, but there it was about seventy or seventy-five feet.
Q. Did you notice the foremost one of those schooners—the Hawley—when she tacked?
A. Yes, sir.
Q. Under the Blackwell's-Island shore?
A. Under Blackwell's-Island shore.
Q. How far from that shore was she when she tacked?
A. When she started to tack?
Q. Yes.

A. She must have been about two hundred feet when she started to tack.

Q. How near did she reach the Blackwell's-Island shore?

A. She reached within about 150 feet.

Q. When she started to tack where was the Mary Evily, the other schooner?

A. Coming right up behind her.

Q. How far from her?

A. Well, I should say about 200 feet, I guess, when she started to tack.

89 Q. Did you notice the Hawley go about?

A. Yes, sir.

Q. When the Hawley was about and her sails drew full of wind, where was the Mary Evily?

A. She was coming right close to her at that time, when she went to go back again to Long Island. At the time she was going across over to Long Island the Mary Evily was coming very close to her, say about 20 feet. I should say she was that far.

Q. And passed along where?

A. Passed along right astern of her.

Q. When the Mary Evily passed the stern of the Hawley, how far was the Hawley from Blackwell's Island?

A. When she passed the stern of her, I should say she was 125 feet or so.

Q. The Hawley was?

A. Yes.

Q. How near did I understand you to say was the nearest the Hawley came to Blackwell's Island?

90 A. I should think 150 feet—somewhere around there.

Q. State what you mean by saying the Hawley at that time was 125 feet from off Blackwell's Island, when the Mary Evily passed her stern.

A. I mean after she turned around to come over to Long Island, that she was about astern of her; whether she was about then or not, I didn't notice. It was about 125 feet from Blackwell's Island, going over.

Q. That is, the stern of the Hawley?

A. That is, the stern of the head vessel.

Q. You mean to say her stern did come within as near as 125 feet of Blackwell's Island?

A. Yes, sir.

Q. After the Mary Evily passed the stern of the Hawley, how long did she continue on towards Blackwell's Island?

A. Well, I should say about three or four minutes; in fact, they were in the act, after they passed the stern of her, of fetching her around.

91 Q. Did she tack immediately?

A. She ran, say about four minutes. She ran all of 25 feet, any way; somewhere around there.

Q. Did you notice when the Mary Evily commenced going about?

A. I noticed when she came astern. Yes, sir, I noticed that.

Q. Where was she then, with reference to the Hawley, when she commenced going about?

A. She was up the river a little.

Q. Was she under the stern of the Hawley?

A. She was behind the Hawley. Her stern came right behind.

Q. Was she close under her stern?

A. Yes, sir, pretty close. I said about 20 feet. That is, the time she commenced to go about.

Q. At that time, when the Mary Evily commenced going about, how far was she from Blackwell's Island?

A. The last schooner?

Q. Yes.

A. She was about 125 feet from Blackwell's Island.

92 Q. At that time, how far was the sloop from the island? Had she varied her distance?

A. About 75 feet from the island at that time.

Q. Did the Mary Evily come any nearer to the island than those 125 feet when she tacked?

A. Well, yes; she must have gone about 25 feet after she tacked—enough to make it about 100 feet from the island.

Q. While tacking, you say she was about 100 feet from the island when she commenced to tack?

A. 125; in going around she ran in that much closer.

Q. How near did the Mary Evily go to Blackwell's Island—the nearest she went?

A. At the time of the collision, she ran right straight in, say about 75 feet from the island. She must have ran that to have ran into the sloop.

Q. How was the Mary Evily heading with reference to the island, at the time she struck the sloop?

93 A. She was heading across and down, about that direction on the island, and down the river. That was the time they came together.

Q. You saw her strike the schooner?

A. Yes, sir.

Q. Did you see which side of the sloop's mast her bowsprit and jib-boom went?

A. It went in through the sails—the is landside of the mast—between the rigging and right in through the sails, a nd tore the sail all up, and the schooner went down.

Q. (By the COURT:) What sail?

A. The mainsail—the only sail that was on the sloop. The sail belonging to the sloop; it went right through it.

Q. Did you see the sloop all the time after the Hawley went about?

A. Yes, sir.

Q. Did you observe whether the sloop made any change in her course?

A. I didn't take notice of them making any change.

Q. Did she make any change?

A. No, she was close on the island all the time.

Q. Did she luff?

94 A. What do you mean by "luff?"

Q. Draw off towards the Long-Island shore.

A. No, sir.

Q. Did you notice anybody at the helm of the sloop?

A. I noticed the man that was steering her.

Q. Did you see whether he left his helm—left the place where he was steering?

A. No, sir.

Q. You mean to say he did not leave it, or you did not notice?

A. Well, he didn't leave it.

Q. You are not acquainted with the movements of vessels, are you?
A. No, sir.
Q. Won't you state exactly where this collision occurred?
A. Opposite the work-house the collision occurred.
Q. (By Mr. BEEBE:) How near is that to the lunatic dock?
A. There are two docks, and the lunatic asylum.
Q. The lower dock?
95 A. Well, I could not judge the distance; say about 200 feet from the dock to the work-house, and it was right about between the retreat and the work-house.
Q. (By the COURT:) Below what dock?
A. Below the coal-dock.
Q. (By Mr. HUNTLEY:) Have you ever observed how far vessels, in heading through there, stand in?
(Obj'd to. Obj'n sustained.)

Cross-exam'd by Mr. Beebe:

Q. You never followed the water?
A. Yes; I have been on the water about two years, up and down that island, but I am no sailor.
Q. Don't you have a crew to row for you?
A. Yes, sir.
Q. You were the guard or keeper?
A. Yes, sir.
Q. You have no particular interest in either of those vessels, have you?
A. No, not a bit.
Q. Neither of the three?
A. No, it don't interest me at all.
96 Q. When did you think there was going to be a collision?
A. When the Hawley was going around I expected the Hawley was going to run in.
Q. Then you thought there was going to be a collision?
A. Yes, sir; that was the first that drew my attention. At the time the head schooner came over towards the island the sloop was very close, and I was looking at the sloop keeping so close to the island, and the wind was then blowing up the river, with a heavy tide running down, and the Hawley came along and came pretty close to her; and I said "I guess there will be a collision." And I never thought of the other one running into her until I *seen* her running up into her stern, and I pulled right about and looked at the collision. That is how I came to notice it at all.
Q. (By the COURT:) Whereabouts were you in your boat in the
97 river when you first began to think the Hawley would strike?
A. About 50 feet from them, and about 25 feet out from off Blackwell's-Island shore.
Q. Which way did the Hawley pass you?
A. Down towards New York.
Q. About 50 feet down?
A. Yes, sir; and the tide was running down.
Q. Before the collision, when they tacked across, they came across you within 50 feet?
A. Yes, sir.
Q. And you were above?
A. Yes, sir.
Q. And about 25 feet further out from the shore?

A. Yes, sir.
Q. You said you saw the two vessels when they struck?
A. Yes, sir.
Q. How did they come together; head and head?
A. (Illustrating:) *Here* is the sloop coming right along the island, and *here* is the vessel that ran into her *this* way, and when she
98 struck she struck about *that* way, at about an angle of 45 degrees right across her bows, so that you could cut her right across.
Q. (By Mr. BEEBE:) Which way was she angling—forward or aft?
A. She ran a kind of cross-ways; she didn't run straight into her.
Q. She was swinging on her tack?
A. She was not swinging much. She just about started to swing.
Q. Could you perceive that she had swung at all?
A. She swung a little, but not much.
Q. (By the COURT:) Had her sails got filled when she struck the sloop; had her sails stopped shaking?
A. No; she struck just about *that* way.
Q. You know when sails are shaking?
A. Yes, sir.
Q. Were the schooner's sails shaking or not?
A. I didn't hardly notice that. I could not notice that, whether her sails were shaking or not.

99 WILLIAM S. WIGGINS, sworn on behalf of respondent.

Examined by Mr. Huntley:

Q. What were you in September last?
A. Mate of the Ethan Allen.
Q. Were you on board of her at the time of this collision?
A. Yes, sir.
Q. I will come right down to the last tack the schooners made on the Long-Island shore to stand towards Blackwell's Island. Did you see them make that tack?
A. I *seen* the head schooner.
Q. You call her the Hawley?
A. Yes, sir.
Q. Did you see the other schooner tack?
A. Not on that tack.
Q. Why didn't you see her?
A. She was behind the Hawley.
Q. Had you seen her before?
A. Yes, sir.
Q. How far did the Hawley stand across the river; how near Blackwell's Island?
A. Within 150 feet, I should think.
100 Q. And then she commenced doing what?
A. Commenced to go about.
Q. While going about, how near did she come to the Ethan Allen?
A. 40 or 50 feet, I should think.
Q. When she was from 40 to 50 feet from the Ethan Allen, how did she bear from the Allen?
A. She bore opposite us very near.
Q. Do you mean to say she was off your beam?
A. Yes, sir; right off there.
Q. At that time, while she was some 40 or 50 feet from you, and off opposite you, where was the other vessel, the Mary Evily?

A. The first I saw of her, she came around the stern.
Q. How near was she to you, when you first saw her?
A. She was up the river about 200 feet, I should think.
Q. And was heading how?
A. Towards Blackwell's Island, a little down the stream.
Q. What did you see her do?
A. Commence to go about—commence to luff.
101 Q. How far was she from Blackwell's Island when she commenced to luff?
A. Well, about the same as the Hawley was, 150 feet, I should think.
Q. Was she at that time close on the wind, or was she off it?
A. She was off the wind a little.
Q. As she commenced luffing, what did you do, if anything, on board of your vessel?
A. We didn't do anything; we kept on our course.
Q. How far were you at that time from Blackwell's Island?
A. About 75 feet, I should think.
Q. Was there an eddy there?
A. There was an eddy inshore. We were about on the edge of it, I should think.
Q. You saw the Mary Evily commence to luff, when she was about 150 feet from Blackwell's-Island?
A. Yes, sir.
Q. What did she then do?
A. She kept on luffing; that was all that I *seen*.
Q. Until when?
A. Until she struck us.
102 Q. Where did she strike you?
A. On the starboard bow.
Q. At the time she struck you, had her sails commenced shaking in the wind?
A. No, sir; I don't think they had.
Q. Then she was still luffing?
A. Yes, sir.
Q. She struck you on your starboard bow. On which side of your mast did her bowsprit and jib-boom go?
A. Her jib-boom went on the port side.
Q. On the Blackwell's-Island side?
A. Yes, sir.
Q. Between the mast and anything else?
A. And the rigging.
Q. Did it come in contact with your sail?
A. Yes, sir; it went through the mainsail.
Q. It could not have touched that side, if it had gone on the other side, could it?
A. No, sir.
103 Q. You saw the Mary Evily come out under the stern of the Hawley, while you were standing on board of your vessel?
A. In the starboard quarter.
Q. How far from the captain?
A. So that I could touch him, very near.
Q. And he was at the helm, was he?
A. Yes, sir.
Q. Did you observe the course of your vessel during that time, that is, whether she went straight, or to the right or left?

A. She went as straight as she could go on her course, keeping her course right along.

Q. Did she luff?

A. No, sir.

Q. Are you positive of that?

A. Yes, sir.

Q. Could you have done anything, and if so, what, to have avoided the collision with the Mary Evily after she came around under the stern of the Hawley?

A. I could not have done anything then, not to keep clear of her.

104 Q. If you had kept off what would have been the effect?

A. She would have struck us in a worse place—amidships.

Q. Suppose you had luffed?

A. She would have come into her any way, then.

Q. Where would she have struck you if you had luffed?

A. She would have struck us head on somewhere.

Q. How deep in the water was your vessel?

A. A little over seven feet.

Q. Was the water close up to her deck?

A. Yes, sir; loaded very deep.

Q. How far were your bulwarks above the deck?

(Not answered.)

Q. Did the captain leave the helm at any time while going up the island?

A. He left it when she struck—not before.

Q. Had the collision actually taken place when he left?

A. Yes, sir; it hit us.

Q. How long have you followed the water?

105 A. Ten years since I first commenced.

Q. Are you familiar with navigation through Hell Gate?

A. Yes, sir.

Q. In your opinion, was there room for the Mary Evily to have gone about at the time the Hawley did?

A. Yes, sir; the other side of her, I should think.

Q. Between her and the Long-Island shore?

A. Yes, sir.

Q. Will you state what, in your opinion, the Mary Evily should have done to have avoided that collision?

A. She should have *went* about when the Hawley did, if she could.

Q. Could she have done it?

A. I don't know whether she could or not.

Q. Was there room for her to do it?

A. Yes, sir.

Q. Why do you say you don't know whether she could or not have done it?

A. I don't know how near she was. There was plenty of river there outside of her for any vessel to work.

(It is admitted by the respective counsel that the carrying-
106 capacity of the Mary Evily was 20 tons of coal; and that the Hawley was about the same size, but rather a larger vessel.)

Cross-ex'm'n'd by Mr. Beebe:

Q. How far were those vessels off when you first saw them?

A. They were up the river when they tacked towards the Long-Island shore.

Q. Half a mile or three-quarters?
A. I don't know.
Q. Can you form any judgment how far they were off?
A. No, sir; I know they were on the tack towards Long Island.
Q. You observed, at any rate, that they were tacking on the wind?
A. Yes, sir.
Q. Beating about?
A. Yes, sir.
Q. After the Hawley tacked on the Long-Island shore, you didn't see the Mary Ev*ily* until she came out under the Hawley's stern?
A. I didn't take any notice of her.
Q. At all?
A. No, sir.
Q. How wide do you think the river is there?
A. Six or 700 feet, I suppose.
Q. How long have you been navigating Hell Gate?
A. Ever since I commenced to go on the water.
Q. Did you come to anchor that day at all?
107 A. No, sir.
Q. Is there a cove off at Hunter's Point?
A. Yes, sir; flats there, where they anchor.
Q. Is there a place there where vessels anchor?
A. Yes, sir.
Q. In an ebb-tide?
A. Yes, sir; or any other tide.
Q. Vessels bound east—is that not a common place for them to anchor in an ebb-tide?
A. Yes, sir.
Q. With the wind as it was that day, and the tide running strong ebb—the strength of the ebb, did you ever undertake to sail a vessel through there before?
A. Yes, sir; I have stemmed the tide up.
Q. How many times, in the course of your experience, do you suppose you have done that?
A. I could not tell; several times, though.
Q. In the course of ten years?
A. Yes, sir.
Q. Could you say half a dozen?
A. Yes, sir.
Q. More than that?
A. I should think so.
108 Q. Can you say it was more than that in ten years, that you attempted to stem the tide through on the first ebb of the tide?
A. We don't very often go through on it.
Q. It is not usual?
A. No, sir.
Q. You generally come to an anchor there?
A. If we think we cannot stem it.
Q. When you spoke about th*eir* being 75 feet off the shore, you took that measurement by your eye?
A. Yes, sir.
Q. And you speak from the inside of the vessel and the shore, don't you?
A. Yes, sir.
Q. And she was about 20 to 25 feet wide?
A. I don't know how wide she is.

Q. Did you form any judgment how wide she was?
A. I suppose she was somewhere in that neighborhood.
Q. At any rate, no attempt was made on the part of the sloop to avoid the collision in any way?
A. She kept on her course.
109 Q. That is the only thing she did do?
A. Yes, sir.
Q. From the first time you saw the vessels until the time the Mary Evily came in contact with you, no effort was made to avoid it, except to keep on your course?
A. That is all. We kept on our course.
Q. About how strong a breeze did you have, do you think?
A. We had a good whole-sail breeze.
Q. How many knots, do you think?
A. Seven or eight knots, I suppose.

Re-direct:

Q. Was your peak settled?
A. A little.
Q. State why you don't go through on an ebb-tide sometimes?
A. I can go through if you stem it.
Q. Do you ever fail to go through when there is wind enough to stem the tide?
A. No, sir.
Q. Don't vessels always go through when they have wind enough?
A. They don't always—*them* that undertake it.
110 Q. Vessels that can stem it go through?
A. Yes, sir.
Q. (By Mr. BEEBE.) Would you have advised to have attempted to stem the strength of the ebb-tide going through there with the risk of vessels beating down?
A. I don't know whether I would or not.
Q. (By Mr. HUNTLEY:) Explain what you mean by saying you don't know whether you would advise the risk of stemming there?
A. I would just as liere run the risk, if I could stem it.
Q. The question is, whether you can stem it?
A. Yes, sir; if I can stem the tide, it is all right.
Q. Do you understand there is any other risk besides stemming it—is that the only risk?
A. That is all that I know of.

JOHN HENDERSON, sworn on behalf of respondent.

Ex'd by Mr. Huntley:

Q. What were you doing in September last?
111 A. I was steward on board of the Ethan Allen.
Q. Were you on board of her at the time of this collison?
A. Yes, sir.
Q. Who was at the helm of your vessel on that occasion?
A. Captain Merrill.
Q. Did he leave it and help at any time?
A. No, sir; only the time they came together.
Q. Did they strike before he left the helm, or did he leave before they struck.
A. He left the helm after they struck.
Q. You saw the collision, did you?
A. Yes, sir.

Q. Did you notice on which side of your mast the jibboom and bowsprit of the schooner went?

A. Yes, sir.

Q. On which side was it?

A. They went on the port side.

Q. Between the mast and anything else?

A. Between the mast and the lee rigging.

112 Q. Did it come in contact with your mainsail?

A. Yes, sir.

Q. What effect did that produce?

A. The flying-jib-boom went through it.

Q. Tore it?

A. Yes, sir.

Q. How far were you from Blackwell's-Island shore at that time, in your judgment?

A. I should judge about 60 to 70 feet.

Q. Did you notice the Mary Evily, when she came out from under the stern of the Hawley?

A. No, sir; I did not.

Q. When did you first see her?

A. I didn't see her, not until she was making the last tack on to Blackwell's Island.

Q. I mean before the collision. Did you see her then?

A. No, sir; I did not.

Q. When did you last discover her before the collision?

A. The last I discovered her was just a moment before she struck us.

Q. Where were you stationed?

A. I was stationed on the quarter.

113 Q. Did you observe whether or not your vessel came at her force?

A. No, sir; she did not.

Q. You observed that she did not?

A. Yes, sir.

Q. Can you say positively that she did not luff?

A. Yes, sir.

Cross-exam'n'd by Mr. Beebe:

Q. Did she yaw?

A. I don't know whether she yawed; it is natural a vessel will yaw a little going stemming the tide.

Q. Did you observe whether she did or not?

A. I did not observe. I am not certain.

Q. Were you doing any duty?

A. No, sir.

Q. Had you had your dinner?

A. Yes, sir.

Q. How long have you followed the water?

A. This will make my second season.

Q. Did you have any talk with the captain about coming to anchor?

A. No, sir.

Q. In the cove at Hunter's Point?

114 A. No, sir.

Q. Didn't you tell the captain you thought he ought to come to anchor there until the ebb-tide had passed?

A. No, sir; I never said anything to him about it.

Q. Did you think it?

A. I thought something of it, and I thought likely he would.
Q. You thought he would come to anchor there?
A. Yes, sir.
Q. While you have been going up and down the Gate—that has been the usual way?
A. Yes, sir; we most always do anchor.
Q. In an ebb-tide, when the ebb-tide is strong?
A. Yes, sir.
Q. So, off the shore, you observed you were running pretty close along the shore?
A. Yes, sir.
Q. Did you think the number of feet in your mind at all, or is it a suggestion since?
A. Just what I thought.
Q. That you were running along within 60 to 70 feet of the shore?
A. Yes, sir.
115 Q. Do you know how long your boom was?
A. No, sir.
Q. Was your boom off square, or trimmed in some?
A. It was off square.
Q. It was not trimmed in a couple of points?
A. Not that I noticed.
Q. Can you say whether it was or not—anything?
A. No, sir; I cannot.
Q. You didn't pay any attention to the steering either, did you?
A. Of course, I could not help but pay attention to the steering.
Q. Did you watch the captain at the wheel, to see what he did?
A. No, sir; I did not.
Q. Were you standing up or sitting down?
A. I was standing up.
Q. On which side?
A. On the starboard side.
Q. How far forward of the wheel?
A. I was right opposite the wheel.
Q. On the starboard side?
A. Yes, sir.
Q. Looking ahead?
116 A. Looking ahead.
Q. The first you observed of the Mary Evily was when you were close together?
A. Yes, sir.

Re-direct:

Q. How long had you followed the water at that time?
A. I guess 5 or 6 months, nearly.
Q. Why do you expect a vessel to anchor on the ebb-tide in that cove?
A. It is according to circumstances, where they anchor. If they have got good wind to run the stem of the tide by——
Q. Do you expect them to anchor if they are bound into the sound?
A. No, sir; not if they have the wind to stem the tide.
Q. The only reason they anchor is because the tide runs so swift, and sometimes prevents their getting through.
A. Sometimes they anchor. If they have got the wind to stem the tide they go on, and if not they will anchor until the tide turns.

Re-cross-exam'n:

117 Q. Hard to handle a vessel under such circumstances, where there is a strong tide against them?

A. I suppose it is. I never had much occasion to try.
Q. (By Mr. HUNTLEY:) You were steward, I understood you say?
A. Yes, sir.

HENRY B. MERRILL, recalled on behalf of respondent.

Exam'n'd by Mr. Huntley:

Q. What is the usage as to a vessel bound east through the sound, going through Hell Gate on an ebb-tide?
A. We get loaded and leave New York, or any port, for the south, and start out with the wind strong enough to stem the tide, we keep our vessel going.
Q. Do you ever stop if there is wind to carry you through, so that you can stem the tide?
A. No, sir.
Q. It is not the usage to stop?
A. No, sir.

Cross-exam'd by Mr. Beebe:

Q. You take it on the first of the ebb, and from that, for about
118 two hours' ebb, is there not generally a fleet of vessels that come down from the east?
A. Sometimes there is, and sometimes hardly any.
Q. Don't they come more at that time than any other, except they are being towed by tugs?
A. At that time there were 5 or 6 vessels passed me at the south end of Blackwell's Island—all passed me on the starboard side.
Q. I want to know if it is not a usual thing that on the first of the ebb, and so for about 2 hours' ebb, during the strength of it, *that* there is in that channel generally more vessels coming toward New York than at any other time?
A. Generally.
Q. Don't they usually come to anchor about Riker's Island, if they have not the tide right?
A. Not if they have the wind to stem through.
Q. Don't they usually?
A. Not if they have the wind to stem through.
119 Q. Are there not a greater number of vessels coming through there, bound west, with an ebb-tide, than with the flood?
A. Yes, sir; because they cannot get through.
Q. It is more crowded too, is it not, with vessels bound toward New York on an ebb-tide—the strength of the ebb?
A. If vessels are waiting at Blackwell's Island, they start on the first of the tide.
Q. It is usually more croweded?
A. There are usually more vessels; don't understand about it being crowded.
Q. When did you go through the last before this, on an ebb-tide?
A. I could not tell you.
Q. Can you tell me whether you have ever *went* through there since on an ebb?
A. Yes, sir.
Q. I mean bound from New York?
A. I don't call to memory now any particular time.
Q. Can you name any particular time, except this last occasion,
120 within the last two years, that you have done it?
A. Yes, sir.

Q. How long ago?
A. This spring.
Q. You have done it this spring?
A. Yes, sir.
Q. Any other occasion?
A. I don't remember of any.
Q. Was the tide on the strength of the ebb then?
A. Yes, sir.
Q. Where was the wind?
A. The wind was to the westward.
Q. Can you remember any other occasion?
A. I do not.

There is one thing I would like to state, speaking about the vessel stemming through Hell Gate: Last season, at one particular time, there were thirty vessels come into Hell Gate, with the wind east and a flood-tide.

JOHN W. PETTY, recalled on behalf of libellant.

Exam'd by Mr. Beebe:

121 Q. Is there any eddy in the ebb-tide along Blackwell's-Island shore—anything more than slow water?
A. No, sir; there is no place that I know.
Q. A little less tide?
A. Yes, sir.
Q. How long have you been in the habit of going through there?
A. I have been through there, off and on, for thirty years.
Q. With no vessel being in your way, how close to Blackwell's Island do you run on an ebb-tide, coming down?
A. It is not uncommon for me to tack within 20 feet of the shore—that is, to clear when I am going around.
(Testimony closed.)

122 At a stated term of the district court of the United States of America for the eastern district of New York, held at the United States court-rooms, in the city of Brooklyn, on Wednesday, the twentieth day of October, in the year of our Lord one thousand eight hundred and sixty-nine—

Present, the Honorable Charles L. Benedict, district judge.

JOHN W. PETTY AND ISAAC HOMAN
vs.
HENRY B. MERRILL AND OTHERS, RESPONDENTS.

This cause having been heard on the pleadings and proofs, and submitted on the briefs and arguments of the advocates for the respective parties, and due deliberation having been had:

Now, on motion of F. A. Wilcox, esqr., proctor for libellants, it is ordered, adjudged, and decreed by the court that the said libellants, John W. Petty and Isaac Homan, do recover herein against Henry B. Merrill, David G. Floyd, and Charles Bates, and Henry F. Ackley, executors, respondents, the damage they sustained by the collision referred to in the pleadings herein, and that it be referred to one of the commissioners of this court to ascertain the amount due, and report thereon to this court with all convenient speed.

CHA'S L. BENEDICT.

123 (Indorsed:) Vol. , No. . United States district court for the eastern district of New York. John W. Petty et al. vs. Henry B. Merrll et al. Int. decree. Order of reference. F. A. Wilcox, proctor for lib'l'ts. Filed and entered the 20th day of October, 1869.

124 U. S. district court, eastern district of New York.

JOHN W. PETTY ET AL.
vs.
HENRY B. MERRILL ET AL.

A decretal order having been entered in the above-entitled cause, whereby, among other things, it was referred to a United States commissioner to compute and ascertain the amount of damages due to the libellant, by reason of the matters and things set forth in the pleadings herein, and to report thereon with all convenient speed:

Now, therefore, I, Charles W. Newton, United States commissioner for the eastern district of New York, to whom the said matter was referred, do report that I have been attended by the proctors for the respective parties, and by their witnesses, and have taken and considered the proofs offered, as well as the points and argument' of the respective counsel, and I do find that there is due to the libellant', as follows:

For expenses for temporary repairs	$275 00
" damages while undergoing same, 19 days, @ $20	380 00
For repairs still necessary	600 00
125 For demurrage during such necessary repairs, 15 days, @ $20	300 00
For interest, by way of damages, on amount of temporary repairs, and the demurrage while undergoing same, $6.55, from Nov. 1st, 1868, to date of this report	71 85
	$1,626 85

Making the whole sum, which I find to be due to the libellants, at the date of this my report, the sum of sixteen hundred & twenty-six dollars and eighty-five cents, ($1,626.85.)

All of which is respectfully submitted.

CHA'S W. NEWTON,
U. S. Commissioner.

Dated Brooklyn, May 15th, 1870.

126

127 (Endorsed:) U. S. district court, eastern district of N. Y. John W. Petty et al. vs. Henry B. Merrill et al. Commissioner's report. Filed June 1st, 1870.

128 *Testimony on reference.*

U. S. district court, E. D.

JOHN W. PETTY ET AL.
vs.
HENRY B. MERRILL ET AL.

COURTLAND B. SLAGHT, who, being sworn for the respondents, says: I live in New Jersey, & do business at Port Richmond, S. I. I hauled out & repaired the vessels there. I am a shipwright & caulker. I

have ways there on which I haul out vessels. I remember that I hauled out the schooner Mary Eveline there in Sept., 1868. I find that I hauled her out, as stated in my book, the 22d day of September. I can't say that that was the day I hauled her on & put her off. It was one or the other. Her captain came there and told me he wanted her hauled out. I found, when I got her out, her forefoot was knocked off. I don't remember that I did anything else. I may have done something else—I don't remember.

Q. Please state what, at that time, the Mary Eveline required to have done to her to make her sea-worthy?

129 A. I don't recollect of doing anything else to her. There must have been something else. It is so long ago I don't remember. There was some small stuff used. Her stem was split. I remember fixing that—fitting some stop-waters in.

Q. Did you make her sea-worthy?

(Obj.; allowed; exc'pt.)

A. I think she was. I can't say positive about that. I supposed she was sea-worthy. I thought so, according to the best of my judgment.

Q. Did you do all that was necessary to be done to make her sea-worthy, in your judgment?

(Obj.)

A. I *done* all the captain wanted me to do; all he asked me to do. I made a memorandum of the work I d*one* on this vessel, & have it with me. I remember what the bill was for the work and material. It was $30.74. That included hauling out, the work, & material furnished on the vessel. I find I have charged twenty cents a ton for hauling out, & that would make her sixty tons. I always take what the captain says the ton'age is.

130

HENRY B. MERRILL, sworn for respondents:

I saw the Eveline at the time of the collision; saw the damage done her. She had her port cat-head split. The ends of the plank that sat on the stem w*as* started. I mean that the oakum in the seams was started. That was all the damage that I saw done to the vessel. I saw that no timbers were broken. I looked at them. Her sampson-post was probably started back quarter of an inch. I noticed her jib-boom. It was not broken, cracked, or fractured. The bowsprit was not injured. It hit nothing. The blow was on her stem. The jib-boom did not strike anything. I was on board the schooner within fifteen minutes after the collision, & saw her. I did not notice her beam aft of the sampson-post. Only one cat-head was broken off. That was the port one. Her port fly-jib-boom guy, that was set up at this cat-

131 head, was carried away. The cat-head was split and let the bolt out that held the guy. The guy was not injured. None other of the head-gear was carried away. I helped them rig in the fly-jib-boom to clear it from the sloop's rigging, after the sloop was sunk; that cleared it from the sloop. That was what fastened us together. I was not on board of the Eveline on Friday of that week. The Friday after the collision she lay at or near Pier 40, East River. She was taking in cargo, light freight, dry freight. I suppose store-goods. I was on board of her about noon. The captain told me that he would be loaded the next day, ready to go out. She had over half a load in. I think she had more in than she could have taken in on that day. I have followed the water over thirty years; as master of a vessel, over fifteen years. I have done general repairs on vessels.

Q. In your opinion, what was the amount of damage done to the Mary Eveline by that collision?

132 Q. By libellants' counsel: What do you mean when you say you have done repairs to vessels?

A. I mean that I have had repairs done to vessels.

(Question as to repairs objected to on the ground that the witness does not appear to be an expert. Question allowed, & exceptions by libellant's counsel.)

A. I think two hundred dollars would cover the whole of it.

Q. What would be a fair rate per day for demurrage of the Eveline?

(Obj'n; obj'n sustained.)

I know the value of demurrage of different classes of vessels, and also of a class of vessels of the Mary Eveline.

Q. State how much would be a fair rate of demurrage per day for that vessel in Sept., 1868.

(Obj. Ex.)

A. Twelve dollars per day—I should judge she was about sixty tons, & I should say she would carry about one hundred & fifteen gross
133 tons. I estimate the demurrage according to her tonnage, the size of the vessel.

Cross-examined:

I live at Greenport, L. I. I left there the fore-part of last week. I was in the sloop Ethan Allen, I think, about three years & a half. That was not the first one I commanded. I commanded the schooner J. N. Brunnett, of 240 tons. I commanded the sloop Caroline about 11 years. I am in the schooner Black Diamond.

Q. What repairs have you had done to vessels?

A. I have had repairs done on all those vessels. I never had repairs done on account of collisions. I had a load of sand and clay in her at the time of the collision—never had one in her before. She was not pretty heavily laden; no more than usually loaded. She was drawing seven feet of water at the time; was not heavily loaded forward; not more so than aft. She was loaded on an even scale. I had
134 seventy-five tons of sand & clay, half & half, at the time of the collision; never had any trouble with the Allen about steering her. We were going between five & six knot breeze. In my opinion the Eveline had the same breeze.

Q. At what rate was the Eveline going?

(Obj.)

A. I don't know. I was not on board of her. I went on board of the Eveline after the collision, about fifteen minutes, & remained, I should think, two hours. There was not a great deal of excitement. It was all over. I noticed, first, that the flying-jib-boom was gone by the splitting of the cat-head. I was at the bow of the vessel during the time. I was examining her. During this time we were unfastening the vessel. I was at her bow most of the time I was on board. I arrived at my estimate of the damage by what I saw broke, and carried away: I did not go into any details of the damage. When she was loading I saw Capt. Petty. My attention was called at that time to other damage by
135 Captain Petty. He called my attention to the spring of the oakum in the seams & to the springing back of her sampson-post. That was all he called my attention to. At that time, the vessel had been repaired as to those damages. He told me that the oakum had spread out. He showed me where it had occurred. I did not notice that any oakum was sprung out at that time. Captain Petty did not say he had been damaged as much as I had been; Capt. Petty did not say how much he had been damaged.

Q. Did not Capt. Petty claim that the damages had not been repaired at that time?

(Obj.)

A. I think not. I can't answer this question any more positively. I do not know how long the Eveline was actually undergoing repairs. I suppose two or three days.

Q. Then how can you make an estimate of the damage?

A. According to what was carried away & broke. The Eveline was a schooner, and was rated probably two & a half. I don't know the rate of my vessel. Sloops are not rated. I have bought & sold vessels. The Allen was sixteen years old. As a sloop her ton'age forty-one tons.

136 U. S. district court.

JOHN W. PETTY ET AL. *vs.* HENRY B. MERRILL ET AL. } Testimony on reference. Feb. 23, '70.

JOHN W. PETTY, being sworn on the part of libellants, says:

I am one of the libellants. I remember the collision between the Mary Eveline & sloop Ethan Allen, which occurred about the month of September, 1868, the 20th. Previous to the collision the Eveline was two years old in October. She was a first-class vessel. Up to the collision she was a good vessel in every way that I know.

Q. How was she injured by that collision?

A. Her stem was split. The stem and apron both were split, so that we could see the light through. Her plank was started from the stem, which caused the vessel to leak. It fractured the jib-boom; it drove the bowsprit aft, & broke the beam that is aft the sampson-
137 post; broke off both cat-heads, & carried away all of the head-gear of the flying-jib-boom. I don't know of any other general damage. I mean there was nothing more broken. She leaked after the collision & after the repairs both. Previous to the collision she never leaked.

(All the foregoing answers as to damages not specified in the libel objected to in time, the libel itself being present & referred to during the examination. Answer taken subject to objection. Exception.)

Q. Have the damages which you have testified been or not fully repaired?

A. No, sir.

Q. What damages have been repaired?

A. We fixed the stem; bolted it together. We only fixed it temporarily. We fixed her up generally. We just fixed her up temporarily. The jib-boom was repaired & cat-heads.

Q. What damages, if any, have not been repaired?

A. My boat wants a new stem where it was fixed. She needs
138 new plank where the planks were broken. She ought to be caulked to make her tight & seaworthy. She has not been since the day of the collision.

Q. How long was she detained in making the repairs you have thus far had done on her?

(Objected to. Exception.)

A. Nineteen days.

Q. Do you know what would be a reasonable demurrage at the time the repairs were made for such a vessel as the Mary Eveline?

A. Yes.

Q. What was the demurrage of the Eveline during the time of the repairs?

(Objected to. Exception.)

A. Twenty dollars a day.

Q. What expense have you been to for the repairs above spoken of?

A. At different times $275 in all.

Q. Was the Mary Eveline, at the time of the collision, carrying cargo?

A. She was light at the time.

Q. How long have you followed the sea?

A. Thirty years, & owned vessels; bought & sold, & had them repaired.

Q. In your judgment what was the extent of the damage which the Mary Eveline sustained on account of this collision?

139 (Objected to on the ground that the witness is not shown to be an expert. Obj. Ex.)

A. Two thousand dollars.

Cross-ex'm.:

I am still master of the Eveline. She is at the foot of West 10th st., in this city. She was last from York River, Virginia. She left there the 14th or 15th of Jan'y last, with oysters, about two-thirds loaded. She was to York River before this last voyage, which was in December last. She was then loaded with oysters. She has been running regularly in the oyster-trade since last fall. She run down the Sound from New York to Greenport last summer. She carried wood & sand & ten thousand brick.

Q. What did that vessel do in the winter of 1868 & 1869.

A. She went to Virginia in the oyster-trade; don't remember how many trips she made. She run all winter; don't remember how

140 many trips she made last summer. I loaded her with coal once before the collision, but not since.

Q. In what business was she employed before the collision?

A. Coasting-trade, from North Carolina to Providence, & around New York & down the sound. She made three trips to North Carolina the summer before the collision. Have carried no merchandise from here to Greenport & never have. The vessel was built in 1866 at Bellport, Long Island, by Isaac Homan, as carpenter. He is half-owner.

Q. Who bolted together the stem?

A. A man by the name of Court. Sleight, of Staten Island. It was done there right away after the collision; he also, at that time spiked the plank. He caulked some; fixed the cat-heads. He took her on the ways & launched her again. I don't know of anything more that he *done*.

Q. Who else has done any repairs on that vessel?

A. Boss Wines, at Port Jefferson, which was the same fall, I think in November, following the collision. He bolted & fixed the stem, &

141 put stop-waters to stop her leaking. I don't know of anything else that he done.

Q. Who else has done repairs on the vessel since the collision?

A. Boss Bishop, of Greenport.

Q. When?

A. She has been on his ways, I think, three times: 1st, in the spring of 1868, & then in the fall of 1868, & then in the spring of 1869. I think I have stated that wrong: we hauled out there last fall, last spring, & the fall before.

Q. What did Mr. Bishop do on her the first time.

A. He caulked her some, drove some treenails, drove some wedges in the stem & caulked around there. That was about all, I think, he *done* the 1st time.

Q. What did he do the 2d time?

A. He did not do much in the stem; he helped me overhaul the schooner, caulked her some, & painted her some.

Q. What did Mr. Bishop do the third time?

142 A. He helped me to haul my boat out, caulked, & fixed her.

Q. How often is it usual to haul a vessel of that kind & trade out?

A. About once a year.

Q. Have you now stated all that you have had done to this vessel by way of repairs?

A. It was on these occasions that all the repairs have been done?

Q. How much did you pay Court. Slaight for repairs?

A. I don't remember, but I think $47.

Q. How much Boss Wines?

A. $164.10.

Q. How much did you pay Boss Bishop in the fall of 1868.

A. I don't remember. I have not named all the bills I have paid for the repairs of this vessel, & can't state what they are, for I have not the bills. This vessel has met with *and* other damage since that collision.

Q. What more does the Mary Eveline to have done by way of repairs for the damages done by the collision?

A. She wants taking into a dry-dock & to lay there twenty days. She wants a new stem, five pairs of new timbers, & all of her plank

143 below water-line taken off aft of her mainmast. She needs a new sampson-post, two pair of beams, one pair of carlines, a breast-hook, & bowsprit; she wants caulking all over, & then she would be seaworthy.

Q. What would be the expense of taking her into dry-dock, & remaining there twenty days?

A. I could answer that better after passing through the experiment. The demurrage of the vessel would be twenty dollars per day; the cost of the ways, of laying on the dock, would be ten dollars per day; the cost of putting in a stem would be eight hundred dollars; the cost of stripping all the plank, putting in the timbers, would be three hundred dollars, & I think it would cost two hundred & fifty dollars to caulk her; the fastening and towing to dry-dock, say one hundred & fifty dollars. That is all I think of.

Q. What was Mr. Bishop's charge a day, on his ways?

A. I don't know.

144 Q. What does Mr. Wines charge a day on his ways?

A. I don't

Q. What does Mr. Sleight charge per day on his ways?

A. I don't know.

Q. How many days would it take to put in the stem?

A. I don't know.

Q. How many days to strip of' the plank?

A. I' will take six men twelve days to get out the stem & put it in; six men ten days to strip off the plank & put in the timbers.

Q. Why have you not had these repairs done?

A. Because I have managed to get along without them.

Re-direct resumed:

Q. Is the last answer in your cross-examination as definite as you can make it?

A. Yes, sir, I believe it is. Mr. Bishop is my brother-in-law.

145 OLIVER H. BISHOP sworn for libellants:

I live in Greenport. I know the sch'r Mary Eveline; have examined her since Sept. 20th, 1868; have heard the testimony of Capt. Petty as to the collision; knew the Eveline before the collision. I am a ship joiner & carpenter. I am a ship-carpenter & not a joiner; have been a ship-carpenter fifteen or sixteen years; have bought & sold vessels, & know the value of them. I examined the Eveline last time last week.

Q. In your opinion, what repairs are still necessary to place the Mary Eveline in a sea-worthy condition?

(Objected to; exception.)

A. Six hundred dollars.

Q. In your opinion, what repairs are still necessary to place the Eveline in as good condition as she was before the collision?

(Objected to; exception.)

A. Six hundred.

Q. Will you please specify what would be such repairs.

(Objected to; exception.)

146 A. I have an estimate I made, which is the same as though I was going to take the job. I made the estimate since I came down here last week.

Q. When did you last see the Mary Eveline, previous to this collision?

A. Could not state the exact time. I had her on my ways before the collision, & looked at her then. I don't think it *were not* more than six months before the collision I examined her. Her condition at that time was good. I examined her all over.

Q. Please specify what repairs would be required to place her in a good condition—the same as she was at the time you examined her.

(Question withdrawn.)

I had her on my ways just after the collision—the same season, & examined her when she was injured. Capt. Petty called my attention where she was injured, & wanted me to look at her & make her tight.

Q. What injury did you then observe?

A. The stem was split; the beam aft the sampson-post was
147 broken; jib-boom was broke, & three planks were cracked on the bow, I think, & the vessel looked as though she spried her oakum. Her oakum was working out. She leaked. That was about all.

Q. *Question.* In your opinion, what would it cost to repair the damages you have mentioned?

A. Six hundred dollars.

Q. Would six hundred dollars place the schooner in as good a condition as she was previous to the collision?

(Objected to; exception.)

A. It would not.

Q. How much would it require to place her in that condition?

(Objected to; exception; withdrawn.)

Q. With the repairs which you have mentioned, would the vessel be as valuable as she was previous to the receiving the injury sustained by the collision?

(Objected to; exception.)

A. The vessel would not be worth as much by five hundred dollars, after these repairs, as before the collision.

Cross-examined:

Q. Do you mean to be understood as saying that six hundred

148 dollars all the damages you saw when you examined the vessel after the collision?

A. It would.

Re-direct resumed:

Q. As I understand from your testimony there are certain repairs yet to be done the Mary Eveline, to place her in as seasonable a condition as she was before the collision, or please state what it will cost.

(Objected to; exception.)

A. Six hundred dollars.

Re-cross resumed:

Q. You were understood to say that six hundred dollars will repair the damage occasioned by the collision? Is that correct?

A. All the specific damage for everything that was broken. There is a general damage that vessels sustain when they come together that they show when they grow old.

Re-direct resumed:

Q. Does this six hundred dollars include the damage?

A. No, sir; only work.

Q. How long would the vessel be detained to repair her?

(Objected to; exception.)

A. About fifteen days. I include everything in the six hundred dollars, except the demurrage & general damage.

149 (Endorsed:) U. S. district court. John W. Petty et al. vs. Henry B. Merrill et al. Testimony before commissioner. F. A. Wilcox, proctor for l'b'ts.

150 U. S. district court.

JOHN W. PETTY ET AL.
vs.
HENRY B. MERRILL ET AL.

The libellants except to the commissioner's report, made under the order of the court, entered in this case in October last:

First. Because the said commissioner has not, in his said report, allowed to them the sum of eight hundred dollars, the value of a new stem.

Second. Because the said commissioner has not, in his said report, allowed to them the sum of five hundred dollars, the amount it will cost, in addition to the items mentioned, to place the vessel in as good and serviceable condition as she was before the collision.

F. A. WILCOX,
Lib'l'ts' Proctor.

Filed June 1st, 1870.

151 *Respondents' exceptions to commissioner's report.*

United States district court, eastern district of New York.

JOHN W. PETTY ET AL.
against
HENRY B. MERRILL ET AL.

The respondents except to the commissioner's report herein, dated May 15, 1870, under the order of this court, heretofore entered, and specify their exceptions as follows:

First. That the allowance of $275 for temporary repairs is too large, and is more than the amount proved.

Second. That the allowance of 19 days' demurrage, at $20 per day, is without evidence to sustain it. and is excessive and wrong.

Third. That from the $600, allowed as necessary repairs, should be deducted the amount allowed for temporary repairs, when that amount is fairly found.

Fourth. That the demurrage of 15 days for such repairs, is excessive in time and in the amount allowed, and should not be allowed at all, for the reason that it is a speculative and illegal charge.

Fifth. That the amount allowed for interest is improper and erroneous on its face, as well as illegal.

Sixth. That the total amount reported for the libellants should not exceed $600.

R. H. HUNTLY,
Proc. for Respondents.

Filed June 21, 1870.

152 At a stated term of the district court of the United States of America for the eastern district of New York, held at the United States court-rooms, in the city of Brooklyn, on the 9th day of January, in the year of our Lord one thousand eight hundred and seventy-one—

Present, the Honorable Charles L. Benedict, district judge.

JOHN W. PETTY ET AL.
vs.
HENRY B. MERRILL, DAVID G. FLOYD, Charles Bates, and Henry S. Ackley, respondents.

The exceptions to the report of Charles W. Newton, U. S. commissioner, to whom it was referred to ascertain the amount due the libellants herein, having been submitted upon the arguments and briefs of the advocates for the respective parties, and due deliberation having been had:

It is ordered that, as to the exceptions to said report on the part of the respondents, the third exception be, and the same is hereby, overruled; the first exception allowed, the libellants to recover only $194.84 for temporary repairs; the second exception allowed, the demurrage being reduced to $100; that the fourth exception be allowed, and that the fifth exception be allowed, the interest to be calculated on $194.84 from the time of expenditure. And it is further ordered that the second exception on the part of the libellant be allowed. And it is further ordered, adjudged, and decreed that the libellants accordingly recover against the above-named respondents, for the damages caused by the collision mentioned in the pleadings herein, the sum of thirteen
153 hundred and ninety-four $\frac{84}{100}$ dollars, with interest amounting to twenty-seven $\frac{53}{100}$ dollars, and costs taxed at two hundred & seventy-one & $\frac{55}{100}$ dollars, making, in all, the sum of sixteen hundred and ninety-five & $\frac{92}{100}$ dollars, ($1,695.92,) and that said respondents be condemned to pay the same.

And it is further ordered that, unless an appeal be taken from this decree within the time limited and prescribed by the rules and practice of this court, the libellants have execution to satisfy their decree.

CHA'S L. BENEDICT.

(Indorsed:) Vol. . No. . United States district court for the eastern district of New York. John W. Petty et al. vs. Henry Merrill et al. Final decree. F. A. Wilcox, proctor for lib'l't'. Filed and ent'd 9th day of Jan'y, 1871.

154 U. S. district court, eastern district of New York.

JOHN W. PETTY AND ISAAC HOMAN, libellants,
against
HENRY B. MERRILL, DAVID G. FLOYD, Charles Bates, & Henry S. Ackley, respondents.

Please take notice that the respondents appeal from the final decree and every part thereof, entered in the above-entitled cause, to the next term of the circuit court of the United States for the eastern district of New York.

Dated New York, January 11th, 1871.

Yours, &c.,

RICHARD H. HUNTLEY,
Proctor for Respondents.

To F. A. WILCOX, Esq'r.
Libellants' Proctor.
SAMUEL T. JONES, Esqr., *Clerk.*

Filed January 11th, 1870.

155 Circuit court of the United States for the eastern district of New York.

JOHN W. PETTY AND ISAAC HOMAN, libellants & appellees,
against
HENRY B. MERRILL, DAVID G. FLOYD, Charles Bates, and Henry S. Ackley, respondents & appellants.

To the honorable the circuit court of the United States for the eastern district of New York, in the second circuit:

The appeal of the above-named appellants respectfully showeth: That on or about the 15th day of January, 1869, the above-named libellants and appellees exhibited their libel in the district court of the United States for the eastern district of New York, against these respondents & appellants, praying, among other things, that these respondents & appellants might be adjudged to pay the libellants' demand in said libel set forth, and that these respondents & appellants might be condemned, for the reasons set forth in said libel, to pay a sum greather than fifty dollars, and each of said libellants, in
156 said libel mentioned, claiming over fifty dollars, besides costs in said libel mentioned.

That process, issued out of said court, having been served on these respondents, they did, on the 26th day of January, 1869, file their joint answer to said libel, in said district court, praying that said libel might be dismissed with their costs in that behalf, as by reference to said libel and said answer may more fully appear.

That the said cause came on to be heard before the Hon. Charles L. Benedict, on or about the 21st, 22d, 23d, 26th, and 27th days of April, 1869; and on or about the 17th day of September, 1869, upon the depositions and proofs taken in said cause, and the testimony and proofs adduced by the respective parties, and said judge having advised thereon, on the 20th day of October made a decree or sentence in said cause, in favor of the libellants against these respondents, with an order of reference to a commissioner to ascertain the amounts; that thereupon, after hearing the testimony and proofs adduced by the respective parties, the said commissioner, on the 15th day of May, 1870, made his report in writing, whereby he finds to be due to the li-
157 bellants the sum of $1,625.85; that thereupon, on exceptions duly made, and filed thereto by the counsel for the respective parties, the Hon. Charles L. Benedict, after having heard the respective counsel in support of their several exceptions, and after having advised thereon, on the 9th day of January, 1871, made a final decree of sentence in said cause, whereby, among other things, it was decreed that the libellants recover against these respondents, for the damages caused by the collision mentioned in the pleadings herein, the sum of $1,394.84, with interest amounting to $27.53, & costs taxed at $271.55, making in all the sum of $1,695.92; and that these respondents be condemned to pay the same, as by reference to said decree will more fully appear, the said final decree therein being filed and entered on the said 9th day of January, 1871.

And these respondents and appellants insist that the said decree is erroneous, inasmuch as the respondents are entitled to have the said suit of the libellants herein dismissed with costs, and inasmuch as the amount found due, as aforesaid, is erroneous and excessive.

And these respondents and appellants, for these and other rea-
158 sons, appeal from the whole and every part of said decree, to the next circuit court to be held in said district, and on said appeal they intend to have said cause heard anew, on the pleadings and proofs in the district court, and on the proofs before the commissioner, and on the exceptions made to the commissioner's report, and to introduce further proofs; and they pray that the record and proceedings may be returned to said circuit court, and that the said decree, and every part thereof, be reversed, or such other decree thereon be made as to said circuit court shall seem just; and that the appellees and libellants be condemned to pay the appellants their costs and damages in the premises.

Dated New York, January 20th, 1871.

RICHARD H. HUNTLEY,
Proctor for Respondents and Appellants.

Filed January 20th. 1871.

159 H. Anstice & Co., stationers, 23 Nassau st., N. Y.]

Bond for costs.

Circuit court of the United States of America, for the eastern district of New York, in the second circuit.

JOHN W. PETTY ET AL., LIBELLANTS & APpellees,
vs.
HENRY B. MERRILL ET AL., RESPONDENTS & appellants.

Know all men by these presents that we, Charles Bates and Edward B. Willets, are held and firmly bound unto the above-named libellants

& appellees in the sum of two hundred and fifty dollars, to be paid to the said libellants & appellees, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the 20th day of January, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas the above-named respondents & appellants have prosecuted an appeal to the circuit court of the United States, for the eastern district of New York, to reverse the decree rendered in the above-entitled suit, by the judge of the district court of the United States, for the eastern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named respondents & appellants shall prosecute their appeal to effect and answer all damages and costs if they fail to make their appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CHA'S BATES. [L. S.]
ED. B. WILLETTS. [L. S.]

Sealed and delivered, and taken and acknowledged, this 20th day of January, 1871, before me,

D. C. WINSLOW, *U. S. Com'r.*

160 UNITED STATES OF AMERICA,
Eastern District of New York, ss:

Charles Bates & Edward B. Willits, being duly sworn, depose and say, & each for himself says: Bates, that he resides at Greenport, L. I.; & Willets, that he resides at 77 Columbia Heights, Brooklyn; that he is worth the sum of five hundred dollars over and above *their* just debts and liabilities.

CHA'S BATES.
ED. B. WILLETS.

Sworn to this 20th day of Jan'y, A. D. 1871, before me,
D. C. WINSLOW,
U. S. Commissioner.

(Indorsed:) Vol. , page . U. S. circuit court. John W. Petty et al., lib'l'ts & appellees, vs. Henry B. Merrill, respondent & appellant. Bond for costs on , proctor. Filed this 20th day of January, 1871.

161 H. Anstice & Co., stationers, 23 Nassau st. N. Y]

Circuit court of the United States of America for the eastern district of New York, in the second circuit.

JOHN W. PETTY ET AL., LIBELLANTS & APPELLEES,
vs.
HENRY B. MERRILL ET AL., RESPONDENTS & appellants.
} Bond for damages.

Know all men by these presents that we, Charles Bates and Edward B. Willets, are held and firmly bound unto the above-named libellants

and appellees in the sum of seventeen hundred dollars, to be paid to the said libellants & appellees, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated the 20th day of January, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas the above-named respondents & appellants have prosecuted an appeal to the circuit court of the United States for the eastern district of New York, to reverse the decree rendered in the above-entitled suit by the judge of the district court of the United States for the eastern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named respondents & appellees shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CHA'S BATES. [L. S.]
ED. B. WILLETS. [L. S.]

Sealed and delivered, and taken and acknowledged, this 20th day of January, 1871, before me.

D. C. WINSLOW,
U. S. Com'r.

162 UNITED STATES OF AMERICA,
Eastern District of New York, ss:

Charles Bates & Edward B. Willetts, being duly sworn, depose and say, & each for himself says, that he is worth the sum of thirty-four hundred dollars over and above his just debts and liabilities.

CHA'S BATES.
EDWARD B. WILLETTS.

Sworn to this 20th day of Jan'y, A. D. 1871, before me.

D. C. WINSLOW,
U. S. Commissioner.

(Indorsed:) Vol. , page . U. S. circuit court. John W. Petty et al., libellants & appellees, vs. Henry B. Merrill et al., respondent & appellee. Bond for on appeal. , proctor. Filed this 20th day of January, 1871.

163 U. S. circuit court.

JOHN W. PETTY ET AL.
ag'st
HENRY B. MERRILL ET AL.

It is hereby consented & stipulated that a copy of the depositions of Captains Merrill, Rackett, & Freeman, taken on appeal before U. S. Commissioner E. L. Owen, on the 21st day of September, 1870, in the suit of Henry B. Merrill et al. against The Schooner "Mary Eveline," her tackle, &c., pending in the southern district, may be read in the above-entitled action in the eastern district, whenever the appeal on the same shall be heard.

And it is further consented and stipulated that the filing of the origi-

nal depositions be waived, & that they may be retained by the proctor for Henry B. Merrill & al., the libellants, in the southern district.

Dated New York, September 23, 1870.

F. A. WILCOX,
Libell'ts' Proctor.
R. H. HUNTLEY,
Cl'm'ts' Proctor.

164 UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered that, on this 21st day of September, in the year of our Lord one thousand eight hundred and seventy, I, Edward L. Owen, a commissioner, duly appointed by the circuit court of the United States, for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812; and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817; and the act entitled "An act to establish the judicial courts of the United States," passed September 24, 1789, did call and cause to be and personally appear before me, at my office, at No. 71 Wall street, in the city of New York, in the said southern district of New York, in the State aforesaid, Henry B. Merrill, to testify and the truth to say, on the part and behalf of the libellants & appellants in a certain suit or matter of controversy now depending and undetermined in the circuit court of the United States for the southern district of New York, 2nd circuit, at New York, wherein Henry B. Merrill, David G. Floyd, Charles Bates, Henry S. Ackley, executor of the last will and testament of Elisha S. Champion, deceased, & als. are libellants against the schooner "Mary Eveline," her tackle, &c.

And, thereupon, the said HENRY B. MERRILL, having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Henry B. Merrill, and he did thereupon depose, testify, and say as follows, viz:

I am 47 years of age. I live at Greenport, Long Island, and am a sea-faring man. I expect to go to sea this afternoon. I have followed the water some thirty-three years, and have been master of a vessel seventeen years, & have been running through Long Island Sound most of the time, and through Hell Gate.

1. Q. In case of a vessel stemming the tide through Hell Gate with a fair wind, what position should she take and keep?

(Obj. to.)

A. She should take one side of the passage, in order to avail herself of the eddy tide, and in order to keep out of the way of vessels
165 beating down in the true tide.

2. Q. Is there a usage or custom with coasters upon that subject?

(Obj. to.)

A. Yes, sir.

3. Q. Have you stated the usage and custom?

(Objected to, not upon the ground of its being leading, but of its relevancy.)

A. Yes, sir.

HENRY B. MERRILL.

166 UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered that, on this 21st day of September, in the year of our Lord one thousand eight hundred and seventy, I, Edward L. Owen, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812; and the act of Congress, entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817; and the act, entitled "An act to establish the judicial courts of the United States," passed September 24, 1789, did call and cause to be and personally appear before me, at my office, at No. 71 Wall street, in the city of New York, in the said southern district of New York, in the State aforesaid, William H. Freeman, to testify and the truth to say on the part and behalf of the libellants & appellants, in a certain suit or matter of controversy, now depending and undetermined in the circuit court of the United States for the southern district of New York, 2nd circuit, at New York, wherein Henry B. Merrill, David G. Floyd, Charles Bates, Henry S. Ackley, executor of the last will & testament of Elisha S. Champion, deceased, & als., are libellants, against The Schooner "Mary Eveline," her tackle, &c.

And thereupon the said WILLIAM H. FREEMAN, having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said William H. Freeman, and he did thereupon depose, testify, and say as follows, viz:

I am 42 years of age. I reside at Sag Harbor, Long Island; and am a sea-faring man, engaged in the coasting-trade. I have been a sea-faring man thirty years. I have been master of a vessel some fifteen or sixteen years. I have been coasting mostly through the sound, to Boston, and also to Philadelphia. I am acquainted with the navigation of Hell Gate.

1. Q. Is there a usage, when going through Hell Gate, stemming the tide, with a fair wind, as to what position a vessel shall take and keep?

(Obj. to.)

167 A. Yes, sir; we consider it so.

2. Q. What is the usage?

(Obj. to.)

A. If we are going up with a fair wind, we generally go as close to one side or the other as possible, so as to keep out of the tide and give vessels beating down a chance in the river.

3. Q. In the case of a vessel going east through Hell Gate, in the eastern channel, with a fair wind, stemming a strong ebb-tide, and discovering two schooners at a distance, beating down, the first-named vessel at the time being close under Blackwell's Island, what is it his

duty to do with reference to the two schooners which she sees beating down?

(Obj. to.)

A. I should take a course and keep it. The vessel stemming the tide should take one shore or the other and hold it.

4. Q. In the case supposed in question 3, what position should the vessel with a fair wind take and keep?

(Obj. to.)

A. I think she should keep close under the island, so as to give vessels a chance in the river.

168 5. Q. Is it usual to go through Hell Gate against the tide when there is wind enough to stem it?

(Obj. to.)

A. Oh, yes; everybody does that.

W'M H. FREEMAN.

169 UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered that, on this 21st day of September, in the year of our Lord one thousand eight hundred and seventy, I, Edward L. Owen, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812; and the act of Congress, entitled "An act in addition to an act, entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817; and the act, entitled "An act to establish the judicial courts of the United States," passed September 24, 1789, did call and cause to be and personally appear before me, at my office, at No. 71 Wall street, in the city of New York, in the said southern district of New York, in the State aforesaid, Henry S. Rackett, to testify and the truth to say, on the part and behalf of the libellants & appellants, in a certain suit or matter of controversy now depending and undetermined in the circuit court of the United States for the southern district of New York, 2nd circuit, at New York, wherein Henry B. Merrill, David G. Floyd, Charles Bates, Henry S. Ackley, executor of the last will & testament of Elisha S. Champion, deceased, & als., are libellants, against The Schooner "Mary Eveline," her tackle, &c.

And thereupon the said HENRY S. RACKETT, having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Henry S. Rackett, and he did thereupon depose, testify, and say as follows, viz:

I am 54 years of age. I have been a sea-fairing man about thirty-five years, and master of a vessel about thirty; and mostly engaged in the coasting-business, through the Long Island Sound, & between Philadelphia & Boston. I reside at Orient, Long Island. I am acquainted with the navigation of Hell Gate.

170 1. Q. When a vessel is going through Hell Gate, stemming the tide, with a fair wind, is there a usage as to what position she shall take and keep?

(Obj. to.)

A. There is.

2. Q. What is that usage?

(Obj. to.)

A. To keep along in the eddy or slack water.

3. Q. What should be her position with reference to the shore?

(Obj. to.)

A. Inasmuch as the eddys or slack-water is close in by the shore, the position of the vessel should be as near the shore as possible.

4. Q. In the case of a vessel going east through Hell Gate in the eastern channel, with a fair wind, stemming a strong ebb-tide, and discovering two schooners at a distance beating down, the first-named vessel at the time being close under Blackwell's Island, what is it her duty to do with reference to the two schooners which she sees beating down.

(Obj. to.)

A. To retain her position under the island, if she has the island close aboard.

Cross-examined by counsel for claimant:

5. Q. Why should she retain this position?

171 A. I should conceive the probabilities of collision more imminent by altering her position.

6. Q. Would it not be proper, under such circumstances, for the first-named vessel to luff when seeing other vessels tacking on the Long-Island shore?

A. I think not; if she has the island close aboard. She could possibly luff, seeing them tack on the opposite shore, but it would have been imprudent for her to do so because the stream is very narrow there. That is the only reason.

H. S. RACKETT.

172 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Edward L. Owen, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the act of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes, depending in the courts of the United States," passed February 20th, 1812; and the act of Congress, entitled "An act in addition to an act, entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817; and the act, entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify that the reason for taking the for'going deposition is, and the fact is, that the witnesses are material and necessary in the cause in the caption of the said deposition named; and that the said cause is now on appeal to the circuit court of the United States for the southern district of New York, 2nd circuit.

I further certify that due notification of the time and place of taking the said deposition' signed by me, was made out and served on the attorney for the adverse party to be present at the taking of the deposition, and to put interrogatories, if he or they might think fit; and that on the twenty-first day of September, A. D. 1870, I was attended by the proctors for the respective parties, and by the witnesses, who were of sound mind and lawful age, and the witnesses were by me first carefully examined and cautioned and sworn to testify the truth, the whole

truth, and nothing but the truth; and the depositions were by me reduced to writing in the presence of the witnesses, and from their statements, and, after carefully reading the same to the witnesses, they subscribed the same in my presence. I have delivered the same to the proctor for the libellant' & appellant' pursuant to a stipulation entered into by & between the proctors for the respective parties.

And I do further certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof I have hereunto set my hand and seal this 21st day of September, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States the ninety-fifth.

[L. S.] EDWARD L. OWEN,
U. S. Commissioner, Circuit Court of the U. S., for the Southern District of New York.

173 EASTERN DISTRICT OF NEW YORK, *ss:*

M. F. Eller, being duly sworn, says that he has carefully compared the within copy of the depositions of Captains Merrill, Freeman, and Rackett with the original depositions of those witnesses, on file in the office of the clerk of the U. S. circuit court, southern district of New York, 2nd circuit, and that the within is a true and correct copy of such depositions.

M. F. ELLER.

Sworn to before me April 8th, 1871.

SAMUEL JONES, *Clerk*

Filed September 23d, 1870.

174 *Decree.*

U. S. circuit court, eastern district of New York.

JOHN W. PETTY ET AL.
vs.
HENRY B. MERRILL ET AL.

The appeal in this case coming on to be heard, and having been argued by counsel for the respective parties, and due deliberation having been had:

Now, on motion of Franklin A. Wilcox, proctor for libellants herein, it is ordered that the sum of five hundred dollars, allowed by the decree of the district court herein, to the libellants, for supposed depreciation in the value of their vessel be disallowed, and that the said decree be and is in all other respects affirmed; and that John W. Petty and Isaac Homan, the libellants herein, recover of Henry B. Merrill, David G. Floyd, Charles Bates, and Henry S. Ackley, as executor of Elisha S. Champion, deceased, respondents herein, the sum of eleven hundred and ninety-five dollars and ninety-two cents, together with the interest thereon from the entry of said decree of the district court, to wit, January 9th, 1871, amounting to ninety-six dollars and eighty-nine cents, and amounting in all to twelve hundred and ninety-two dollars and eighty-one cents, and that the libellants have execution to satisfy this decree.

$1,195.92
96.89
$1,292.81

175 Dated March 8th, 1872.

L. B. WOODRUFF,
Circuit J.

(Endorsed:) U. S. circuit court, eastern district of New York. John W. Petty et al. vs. Henry B. Merrill et al. Decree. F. A. Wilcox, lib'l'ts' proctor. Filed & entered the 8th day of March, A. D. 1872.

176 Circuit court of the United States for the eastern district of New York.

JOHN W. PETTY AND ISAAC HOMAN
against
HENRY B. MERRILL, DAVID G. FLOYD, AND Charles Bates, and Henry S. Ackley, as executor of the last will and testament of Elisha S. Champion, deceased.

Please take notice that the above-named respondents, conceiving themselves aggrieved by the final decree entered on the 8th day of March, 1872, in the above-entitled cause, do hereby appeal therefrom to the Supreme Court of the United States, at a term thereof to be held at Washington, on the first Monday in December next.

Dated New York, March 18th, 1872.

RICHARD H. HUNTLEY,
Proctor for Resp'd'ts & App'l'ts, 35 Pine st., N. Y.

To F. A. WILCOX, Esqr.,
Proctor for Libellants and Appellees.
To SAMUEL T. JONES, Esqr., *Clerk.*

177 (Endorsed:) U. S. circuit court, eastern district. John W. Petty et al. vs. Henry B. Merrill. Notice of appeal. R. H. Huntley, proctor for resp'd'ts and appell'ts, 35 Pine st., N. Y. To Samuel T. Jones, clerk. Filed March 18th, 1872.

178 Circuit court of the United States for the eastern district of New York.

JOHN W. PETTY AND ISAAC HOMAN
against
HENRY B. MERRILL, DAVID G. FLOYD, AND Charles Bates, and Henry S. Ackley, as executor of the last will and testament of Elisha S. Champion, deceased.

To the honorable the Supreme Court of the United States:

The appeal of Henry B. Merrill, David G. Floyd, Charles Bates, and Henry S. Ackley, the above-named respondents and appellants, respectfully sheweth: That, on the fifteenth day of January, 1869, John W. Petty and Isaac Homan, the above-named libellants and appellees, filed their libel in the district court of the United States for the eastern district of New York, against the above-named respondents and appellants, for the recovery of twenty-one hundred dollars damages,
179 alleged to have been sustained to the schooner "Mary Eveline," then belonging to them, by collision in the East River with the sloop Ethan Allen, then belonging to said respondents and appellants, and that thereupon said respondents filed their answer to said libel; that previously, and on the twenty-third day of December, 1868, the above-named respondents and appellants filed their libel in the district court for the southern district of New York against the schooner

"Mary Eveline" for the recovery of thirty-four hundred and eighty-nine $\frac{37}{100}$ dollars ($3,489.37) damages, alleged to have been sustained to the sloop "Ethan Allen" by the same collision; that owing to the state of the calendar of the said district court for the eastern district of New York, the above-named cause of Petty et al. vs. Merrill et al. was first reached, and that by consent of counsel both the above-named causes were heard and tried together in the said district court for the eastern district, on the same facts and proofs; that both causes were decided together by said court, and that the libel in the cause of Merrill et al. vs. The Schooner "Mary Eveline" was dismissed, and that in the cause of Petty et al. vs. Merrill et al. the libellants were awarded dam-
180 ages, and a reference was ordered to ascertain the amount; that accordingly, on nineteenth day of October, 1869, a final decree was made and announced in the above-named cause of Merrill et al. vs. The Schooner Mary Eveline, whereby, among other things, it was decreed that the libel therein be dismissed; that on the ninth day of January, 1870, a final decree was made and announced in the above-named action of Petty et al. vs. Merrill et al., whereby, among other things, it was decreed that the libellants recover against these respondents for the damages caused by said collision, together with interest and costs, amounting in all to the sum of sixteen hundred and ninety-five $\frac{92}{100}$ dollars, (1,695.92;) that thereupon these respondents and appellants appealed from the decree of the said district court in the cause of Merrill et al. vs. Schooner Mary Eveline, to the circuit court of the United States for the southern district of New York, and also from the decree of the said district court in the cause of Petty et al. vs. Merrill et al., to the circuit court of the United States for the eastern district of New York; that the appeal in the case of Merrill et al. vs. The Schooner Mary Eveline was first heard, and that, by consent, the
181 merits of the collision as affecting the rights of the libellants in both causes were considered upon the argument of said cause, and that on the twenty-fifth day of November, 1870, the said circuit court made a final decree in said cause, whereby it was decreed that the said decree of the district court be in all things affirmed, with costs; that upon the hearing of the appeal from the said cause of Petty et al. vs. Merrill et al., subsequently, the circuit court for the eastern district of New York deemed itself concluded by the said decree in the cause of Merrill et al. vs. The Schooner Mary Eveline, and did not hear the cause anew upon the merits, and that the question of damages was the only point considered anew upon said appeal; that on the eighth day of March, 1872, the said circuit court for the eastern district made a final decree in the said cause of Petty et al. vs. Merrill et al., whereby it was decreed that the sum of five hundred dollars allowed by the decree of the district court therein for supposed depreciation in the value of their vessel be disallowed to the libellants, and that the said decree of the district court be in other respects affirmed, and that said libellants recover interest on the sum of eleven
182 hundred and ninety-five $\frac{92}{100}$ dollars, ($1,195.92,) from the date of entry of said decree of the district court, amounting in all to the sum of twelve hundred and ninety-two $\frac{81}{100}$ dollars, ($1,292.81,) and that the libellants have execution for said decree.

And this appeal further showeth that an appeal was taken by these respondents and appellants from the said decree of the circuit court for the southern district of New York, in the cause of Merrill et al. vs. The Schooner Mary Eveline, and that said appeal is now pending before this honorable court.

Now, therefore, these appellants, being advised that the decree made by the said circuit court in the cause of Petty et al. vs. Merrill et al. is erroneous, and that it ought to be reversed, and conceiving that the final decision of said cause is dependent upon the final decision of the aforesaid cause of Merrill et al. vs. The Schooner Mary Eveline, and that it would be unjust and inequitable to these appellants that there should be made a final disposition of one cause while the other cause, based upon the same facts, and being in the nature of a cross-libel, is still pending and undecided, and further conceiving that the matter in dispute is
183 by reason of the undecided cause of Merrill et al. vs. The Schooner Mary Eveline more than the sum of two thousand dollars, do appeal from the whole of said decree of said circuit court in the cause of Petty et al. vs. Merrill et al. to the Supreme Court of the United States, and respectfully pray that the said decree of the said circuit court and the libel, answer, pleadings, depositions, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court, and every part thereof, may be reversed, and a decree be made in favor of said appellants, in conformity with the prayer in said answer contained, with costs, or such other decree as to the Supreme Court should seem just.

(Endorsed:) U. S circuit court for the eastern district of New York, John W. Petty et al. vs. Henry B. Merrill et al. Petition of appeal. R. H. Huntley, proctor for resp'd'ts and app'l'ts. Filed March 18th, 1872.

184 *Bond for costs and damages.*

Circuit court of the United States of America, for the eastern district of New York, in the second circuit.

JOHN W. PETTY AND ISAAC HOMAN, libellants and appellees,
vs.
HENRY B. MERRILL, DAVID G. FLOYD, Charles Bates, and Henry S. Ackley, respondents & appellants.

Know all men by these presents that we, David G. Floyd, of Greenport, Suffolk County, and State of New York; S. Wells Phillips, of Greenport, of same county and State; and G. H. Corwin, of Greenport, of same county and State, are held and firmly bound unto the above-named John W. Petty and Isaac Homan, in the sum of twenty-five hundred dollars, to be paid to the said libellants & appellees; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the fourth day of March, in the year of our Lord one thousand eight hundred and seventy-two.

Whereas the above-named respondents & appellants have prosecuted an appeal to the Supreme Court of the United States, to reserve the decree rendered in the above-entitled suit, by the judge of the circuit court of the United States, for the eastern district of New York, in the second circuit:

Now, therefore, the condition of this obligation is such, that if the above-named respondents & appellants shall prosecute their said appeal

to effect, and answer all damages and costs if they fail to make their plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

DAVID G. FLOYD. [L. S.]
S. WELLS PHILLIPS. [L. S.]
G. H. CORWIN. [L. S.]

Sealed and delivered, and taken and acknowledged, this fourth day of March, 1872, before me—

[L. S.] GEO. H. CLEAVES,
Notary Public, Suffolk Co.

185 UNITED STATES OF AMERICA,
Eastern District of New York, ss:

S. Wells Phillips and G. H. Corwin, being duly sworn, do depose and say, and each for himself says, that he is worth the sum of twenty-five hundred dollars, over and above his just debts and liabilities.

S. WELLS PHILLIPS.
G. H. CORWIN.

Sworn to this fourth day of March, A. D. 1872, before me,

[L. S.] GEO. H. CLEAVES,
Notary Public, Suffolk Co.

(Indorsed:) Vol. , page . U. S. circuit court. John W. Petty et al., libell'ts & appellees, vs. Henry B. Merrill et al., resp'd'ts & appellants. Bond for costs on appeal and damages. R. H. Huntley, proctor for app'll'ts, 35 Pine st., N. Y. Filed this 18th day of March, 1872.

Approved as a bond for costs, May 14, 1872.

L. B. WOODRUFF,
Circuit Judge.

186 By the Honorable Lewis B. Woodruff, one of the judges of the circuit court of the United States for the eastern district of New York, in the 2nd circuit.

To JOHN W. PETTY and ISAAC HOMAN:

Whereas Henry B. Merrill, David G. Floyd, Charles Bates, and Henry S. Ackley have lately appealed to the Supreme Court of the United States from the decree lately rendered in the circuit court of the United States for the eastern district of New York, in the 2nd circuit, made in favor of you, the said John W. Petty and Isaac Homan, and have filed the security required by law:

You are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the first Monday of December, 1872, to do and receive what may appertain to justice to be done in the premises.

Given under my hand in the city of New York, in the southern district of New York, in the 2nd circuit, this 14th day of May, 1872.

L. B. WOODRUFF,
Circuit Judge.

(Endorsed:) U. S. circuit court, eastern district New York. John W. Petty, et al. against Henry B. Merrill et al. Citation. R. H. Huntley, proctor for resp'd'ts & appellees, 35 Pine st., N. Y. Filed May 14th, 1872.

187 CITY OF BROOKLYN,
County of Kings, ss:

BENJAMIN C. HEALD, being duly sworn, says that he is a clerk in the office of Richard H. Huntley, esq., proctor for the claimants herein; that he knows, of his own knowledge, that a copy of the within citation was duly served on F. A. Wilcox, esq., proctor for the libellants herein, by delivering to and leaving the same with said F. A Wilcox, personally, at his office, No. 17 Wall street, in the city of New York, by Frederick G. Ireland, another clerk in the said office of Richard H. Huntley, on the 14th day of May, 1872; that said Frederick G. Ireland is at present absent from the city and State of New York.

BENJAMIN C. HEALD.

Sworn to before me this 28th day of October, 1872.
[L. S.]
K. HARRISON,
Notary Public, Kings Co.

188 UNITED STATES OF AMERICA,
Eastern District of New York, ss:

I, Samuel T. Jones, clerk of the circuit court of the United States of America for the eastern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 185, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of John W. Petty et al. against Henry B. Merrill et al., as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Brooklyn, in the eastern district of New York, in the second circuit, this 13th day of November, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the said United States the ninety-seventh.

SAMUEL T. JONES, *Clerk.*

(Indorsement on cover:) No. 485. Henry B. Merrill, David G. Floyd, Charles Bates, and Henry S. Ackley, as ex'r of Elisha S. Champion, dec'd, appellants, vs. John W. Petty and Isaac Homan. E. New York, C. C. U. S. Filed 26th November, 1872.

U. S. Supreme Court.

HENRY B. MERRILL *et al.*,
Appellants,
vs.
JOHN W. PETTY *et al.*,
Appellees.

Appellants' Points in opposition to motion to dismiss appeal.

This is a motion to dismiss the appeal in this cause, on the ground that the matter in dispute, exclusive of costs, does not exceed the sum of two thousand dollars.

The appellants insist that the matter in dispute is $4,782 18.

The petition of appeal shows:

First. That on January 15th, 1869, the appellees filed their libel in the District Court for the Eastern District of New York, against the appellants, for the recovery of $2,100 damages, alleged to have been sustained by their schooner, the Mary Eveline, in a collision with the appellants' sloop, Ethan Allen, in which collision the Ethan Allen was sunk and lost in the East river.

Second. That before the commencement of this suit, viz., the suit of Petty *et al. v.* Merrill *et al.*, and on December 23d, 1868, the appellants filed their libel in the District Court for the Southern District of New York, against the appellees' schooner, Mary Eveline, to recover $3,489 37 damages sustained by their sloop Ethan Allen, by reason of the same collision.

Third. That, owing to the fact that the calendar of the District Court for the Southern District was larger than the calendar of the District Court for the Eastern District, the cause of Petty *et al. v.* Merrill *et al.* was first reached, and, by consent of counsel, both causes were heard together by the Court in the Eastern District, on the same facts and proofs.

Fourth. That the libel in the case of Merrill *et al. v.* The Schooner Mary Eveline was dismissed, and the Court decreed that the libellants in the case of Petty *et al. v.* Merrill *et al.* recover $1,695 92 damages.

Fifth. That these appellants appealed from both decrees to the Circuit Courts for the Southern District of New York and the Eastern District of New York, respectively.

Sixth. That, because of the hearing before a commissioner, in the case of Petty *et al. v.* Merrill *et al.* for the purpose of assessing the damages, the appeal in the case of Merrill *et al. v.* The Schooner Mary Eveline was first heard, and, by consent of counsel, the merits of the collision in both cases was considered upon that argument; that the Circuit Court affirmed the decree of the District Court.

Seventh. That on the hearing of the appeal in the case of Petty *et al. v.* Merrill *et al.* the Court deemed itself concconcluded by the decision in Merrill *et al. v.* The Schooner Mary Eveline, and refused to review anew the merits of of the collision; that it did not hear the cause anew upon the merits, they having been passed upon, but considered the question of damages only, and disallowed an item of $500, thereby reducing the amount of the decree to $1,292 81.

Eighth. That in the cause of Merrill *et al.* v. The

Schooner Mary Eveline, an appeal was taken from the decree of the Circuit Court to the Supreme Court of the United States, which appeal is now pending, and the cause is number 204 upon the calendar of this court, to which reference may be made for additional facts.

Ninth. That the appellants' appeal in this cause to the Supreme Court of the United States because the final decision in this cause is dependent upon the final decision in the cause of Merrill *et al.* v. The Schooner Mary Eveline; that the matter in dispute by reason of said undecided cause of Merrill *et al.* v. The Schooner Mary Eveline exceeds the sum of $2,000, and amounts to $4,782 18.

POINTS.

First. The libel in this case is in the nature of a cross-libel. It was brought *in personam* because there was no vessel or *res* against which it could have been brought, the Ethan Allen having been sunk in the collision.

Both actions are brought to recover damages for the same collision; the facts and the witnesses are the same; the question to be determined is the same, viz.: Which was the faulty vessel in the collision; and both causes were tried together, and the merits of the collision in both have been argued as one.

Second. The matter in dispute means the matter for which suit is brought, on which issue is joined, and in relation to which jurors are called and witnesses examined.

Lee v. Watson, 1 Wallace, 337.

The statement of the facts set forth in the petition of appeal shows that the matter on which issue was joined and in relation to which witnesses were examined, was the same in both suits. Both were brought to determine which party should suffer the loss incurred by the collision.

Third. In this case the amount in dispute is found by adding together $3,489 37, the amount of libellants' claim in the cause of Merrill *et al.* v. The Schooner Mary Eveline, and $1,292 81, the amount decreed by the Circuit Court to the libellants in the cause of Petty *et al.* v. Merrill *et al.*, making in all the sum of $4,782 18.

Fourth. No case can be cited, where a cross-libel had been filed and the damages litigated was over $2,000, in which the court denied jurisdiction.

Fifth. If this court decides that it has discretion to entertain this motion, then the proper exercise of that discretion will be to postpone the decision of this motion until the hearing of No. 204, as suggested in the amendment to the sixth rule. The court is referred to No. 485 as containing the record in this cause, and will see the propriety of the suggestion that the two causes should be argued together.

Sixth. This motion should be denied.

RICHARD H. HUNTLEY,
For the Appellants, and in opposition to the motion.

U. S. Supreme Court.

HENRY B. MERRILL, *et al.*,
Appellants,

vs

JOHN W. PETTY, *et al.*,
Appellees.

Points for Appellees.

The libel was filed in the District Court of the United States, for the Eastern District of New York, to recover for damages sustained to the appellees' vessel, the schooner *Mary Eveline*, by a collision with the appellants' vessel, the sloop *Ethan Allen*.

About the same time the appellants, the respondents below, and owners of the said sloop, *Ethan Allen*, together with C. & W. Whitehead, owners of the cargo laden on board the said sloop at the time of the collision, filed their libel in the Southern District of New York, to recover for damages to the said sloop and her cargo by the same collision. This cause was heard first, it being agreed that the evidence taken in this case should apply to both cases, and decrees entered in both cases according to the decision herein.

The decision was in favor of the appellees, and a decree was entered in this case in their favor for the sum of $1,695.92, from which an appeal was taken by the appellants

to the Circuit Court, which, on the 8th day of March, 1872, affirmed the decree, on the merits, and gave judgment for $1,292.81.

Papers for an appeal to this Court were served in this case, and the case is now on the calendar.

The appellees now move to dismiss the appeal in this case, on the ground that the amount in dispute, exclusive of costs, does not exceed the sum of two thousand dollars.

I.

To entitle the appellants to sustain their appeal, the amount in dispute, exclusive of costs, must be in excess of $2,000.

Act. 1789, 1 Stat. at Large, p. 84, and 2 Stat. at Large, p. 244; Gordon *vs.* Ogden, 3 Peters, 33; Smith *vs.* Honey, 11. 469; Old Grant *vs.* McKee, 1 Peters, 248; Knapp *vs.* Banks, 2 How., 73; Spear *vs.* Place, 11 How., 522.

II.

Several claims, although the same defendant may have to pay them, cannot be added to make jurisdiction, although united in the same suit.

Rich *vs.* Lambert, 12 How, 352; Oliver *vs.* Alexander, 6 Peters, 143; The Water Witch, 1 Black; The Roarer, 1 Blatch. C. C., p. 1, 494.

III.

When judgment is obtained by a plaintiff or libellant the amount in dispute is the amount of the judgment, and that decides the question of the right to appeal.

Phillips Prac, p. 74 (head of page).

Here the judgment appealed from is less than $2,000; it is but $1,292.81.

IV.

The appeal should be dismissed.

F. A. WILCOX,

For the Appellees and the motion.